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No. (1)

IN THE
Supreme Court of the United States

BEVERLY BOULEVARD, LLC,

Petitioner,

v.

CITY OF WEST HOLLYWOOD AND
WEST HOLLYWOOD COMMUNITY DEVELOPMENT
COMMISSION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

For wholly aesthetic reasons, Respondents forbade a specific type of outdoor advertising known as "tall walls" except on one specific street. The Ninth Circuit upheld that prohibition against Fifth and First Amendment challenges because (1) aesthetic regulation is important to cities, (2) the evil to be remedied was the mere presence of "tall wall" signs, (3) the regulation eliminated all the signs, and (4) that was necessary to deal with the problem.

Question 1. The Court has upheld aesthetic regulation that impinges on First Amendment rights only when a public safety interest also supported it. This case isolates the question whether a city's interest in aesthetics — alone — is sufficient to justify a ban on outdoor advertising on the "tall walls" of privately owned commercial buildings. In a related manner, the case presents the question whether the *Central Hudson* test for First Amendment compliance (with its intermediate scrutiny) requires reconsideration to eliminate the kind of tautological conclusion reached by the Ninth Circuit in this case.

Question 2. In deciding whether a municipal regulation has taken private property for public use without compensation, may a U.S. Circuit Court ignore state definitions of property and invent its own definition contrary to state law in order to reverse a District Court liability finding?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

All parties are listed in the caption:

- Petitioner Beverly Boulevard, LLC was the plaintiff, appellee, and cross-appellant below.

- Respondents City of West Hollywood and West Hollywood Community Development Commission were defendants, appellants and cross-appellees below.

Pursuant to S.Ct. Rule 29.6, Petitioners state that Petitioner Beverly Boulevard, LLC has no parent corporation and no publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Beverly Boulevard, LLC petitions for a writ of certiorari to review a final judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reproduced as Appendix A, and the denial of panel rehearing and rehearing en banc is Appendix D. The Opinion affirms in part, reverses and vacates in part, a judgment of the United States District Court, Central District of California, reproduced in Appendix B. That court's Order granting in part and denying in part motions for summary judgment is Appendix C.

JURISDICTION

The Ninth Circuit entered judgment on June 5, 2007, and denied a timely petition for panel rehearing and rehearing en banc on July 20, 2007.

On October 2, 2007, this Court granted an application (No. 07A281) extending the time to file this petition to December 3, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, First Amendment: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

U.S. Constitution, Fifth Amendment: ". . . nor shall private property be taken for public use without just compensation."

U.S. Constitution, Fourteenth Amendment:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

Pertinent portions of Ordinances of the City of West Hollywood are reproduced in Appendix E.

INTRODUCTION

Communications media are changing, and the law needs to keep pace. A quarter-century ago, the Court acknowledged that its decisions regarding outdoor advertising were out of date. Thus, the Court exercised appellate jurisdiction over *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), with the recognition that "we have not given plenary consideration to cases involving First Amendment challenges to statutes or ordinances limiting the use of billboards" since 1932. (453 U.S. at 498.) Presumably, the Court's intent was to provide more contemporary analysis of the First Amendment restrictions on outdoor advertising regulation.

Unfortunately, the end-product of *Metromedia* was five separate opinions, none of which commanded a majority. (There was a four-Justice plurality opinion, a two-Justice opinion concurring only in the judgment, and three dissenting opinions.) The result has caused confusion in the lower courts — not to mention the legislative bodies seeking guidance on the extent of their regulatory authority. *Metromedia* was described by the Third Circuit (strenuously searching for guidance) as "a badly splintered plurality opinion" having "little precedential effect . . . ." (*Rappa v. New Castle County*, 18 F.3d 1043, 1047 [3d Cir. 1994].) The

need for clarity in the rules governing the intersection of regulatory power over outdoor advertising and the First Amendment has never been more serious.

Outdoor advertising has continued to develop since *Metromedia*, but with little guidance from the Court. This case, for example, involves so-called "tall wall" signs, i.e., signs affixed to an entire exterior wall of a commercial building. The Respondent City of West Hollywood has decided — solely on the basis of subjective aesthetics — that tall wall signs are banned outright everywhere in the entire city except for one street.

In addition to the need for general First Amendment guidance post-*Metromedia*, the test generally used to determine whether regulations comply with the First Amendment (see *Central Hudson Gas & Elec. Corp. v. Public Service Commn.*, 447 U.S. 557, 566 [1980]) needs reconsideration. In its own way, it has created as many problems as *Metromedia*.

> "The courts, including this Court have found the *Central Hudson* 'test' to be, as a general matter, very difficult to apply with any uniformity." (*44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 526-527 [Scalia, J., concurring] [1996].)

As demonstrated by the case at bench, it can be applied in a circular manner to rationalize wholesale elimination of a mode of communication.

Particularly when the regulatory rationale is wholly a matter of personal taste, rather than safety, application of a rule that allows a municipality to say that the "evil" being dealt with is dislike of the appearance of a specific form of communication, the remedy chosen is the elimination of that form of communication, and the remedy effectively solves the problem (as the Ninth Circuit applied *Central Hudson* in this case [see App. A-6-7]) is too simplistic to satisfy elementary due process precepts, not to mention common sense. It is akin to the old saw that decapitation cures headaches.

Either *Metromedia* or *Central Hudson* would justify certiorari review here. Together, they create First Amendment anarchy.

STATEMENT OF THE CASE

Petitioner is the owner of a commercial office building at 8899 Beverly Boulevard in the City of West Hollywood, California. On September 15, 2000, Petitioner erected multi-story signs or murals on the east and west exterior walls of the building. One was a collage of Andy Warhol artwork (including his famous Campbell's Soup can and his image of Marilyn Monroe), while the other was an advertisement for the City's Veteran's Memorial Fund and consisted of various patriotic images. Some of the tall wall photographs admitted in evidence are reproduced in App. F-63-65.

The City's sign ordinance at that time broadly defined signs, but did not purport to regulate a certain form of non-commercial signs; *i.e.*, art murals not containing "letter[s] intended to advertise." (App. E-60.) The City's inspector determined that both signs were exempt from the ordinance. (App. C-18-19.)

Several months later, Petitioner changed the copy on the two signs. In May, 2001, the City enacted a new sign ordinance which required a conditional use permit for the use of any "tall wall" signs, even if (like the ones on the walls of Petitioner's office building) they had been in place before the new ordinance was adopted. Permits would only be granted for Sunset Boulevard properties. (See App. E-60-61.)

On June 1, 2001, Petitioner again changed the copy on one of its signs and, shortly thereafter, was cited by the City for violating the sign ordinance. The citation was upheld on an administrative appeal and this suit was filed.

Petitioner sued the City and its Community Development Commission under 42 U.S.C. § 1983 and the First, Fifth, and Fourteenth Amendments to the U.S. Constitution for interfering with its right of expression and for taking its property for public use without either due process or just compensation. (App. C-21-22.)

During the litigation, the parties almost consummated a settlement. Under its terms,

Petitioner sought a change to the City's zoning ordinance to allow its "tall wall" signs. The City Council rejected the amendment on a 3-2 vote. The bases for its action were that the City wanted all such signs located only on Sunset Boulevard,[1] that tall wall signs were not consistent with the "character" of Beverly Boulevard, and that the signs would visually impact nearby residential properties. (App. C-23-25.)

When settlement failed, the parties returned to court. The District Court held that the sign on the east wall of Petitioner's building was a protected property interest under California law because it was always a commercial advertising sign (albeit for the City's Veteran's Memorial Fund [App. F-65]) and that any interference with it by the City required compensation under the State's Outdoor Advertising Act. The City's actions were held to be a taking as to the east wall sign. Other claims as to that sign were thus dismissed as moot. (App. C-28-33.)

The District Court held contrarily as to the western sign. That one had been purely an art mural as originally erected and Petitioner had replaced the art murals with a commercial sign advertising a new movie. (App. F-63-64.) Relief was thus denied for that sign. (App. C-33-40.)

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[1] Sunset Boulevard, as it passes through West Hollywood, is "known for its flamboyant billboards." (App. A-6.)

Both sides appealed. The Ninth Circuit, in a brief opinion that was long on holding but short on analysis ruled for the City on both appeals. (App. A-1-7.) That Court had asked the parties to be prepared to comment at oral argument on the applicability and effect of *Williamson County Reg. Plan. Commn. v. Hamilton Bank*, 473 U.S. 172 (1985),[2] and then spent much of the oral argument inquiring about that case. Thereafter, the Court decided that it could simply assume the matter was ripe without deciding the point. (App. A-3.) The Ninth Circuit held that, contrary to the District Court's conclusion, Petitioner had no protectible property interest and thus there could be no Fifth Amendment violation. The Opinion ignored Petitioner's reliance on California's broad definition of "advertising" and held simply that artwork is not advertising, and therefore not property. (App. A-4.)

With respect to the First Amendment, the Opinion rejected in a single sentence the concept that a police power regulation could interfere with

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[2] As the Court may recall, *Williamson County* has been the subject of much controversy and commentary because of its holding that property owners seeking compensation for a regulatory taking must first seek compensation under state law before their cases will be "ripe" for federal court litigation. In *San Remo Hotel v. City & County of San Francisco*, 545 U.S. 323 (2005), the late Chief Justice, joined by three others, filed a concurring opinion urging the Court to overrule *Williamson County* when the opportunity presented itself, as the issue was not properly raised in that case.

First Amendment rights only if some interest in addition to purely aesthetic interests was involved and concluded that the evil sought to be remedied was the presence of tall wall signs anywhere but on Sunset Boulevard and that the ordinance directly and properly dealt with it by banning all such signs. (App. A-6.) Petitioner's timely Petition for Rehearing both by the panel and en banc was denied. (App. D-57-59.) Thus, this Petition.

BASIS FOR GRANTING THIS WRIT OF CERTIORARI

I.

THERE IS CONFLICT AND CONFUSION REGARDING THE FIRST AMENDMENT RIGHTS OF THOSE IN THE OUTDOOR ADVERTISING BUSINESS

The Court was correct in 1981 when it decided to accept jurisdiction in *Metromedia* and analyze First Amendment regulation of outdoor advertising in light of developments since the Court last considered such matters during the Great Depression. The idea was right, but the timing proved to be all wrong. *Metromedia* resulted in a splintered Court and five separate opinions, providing little guidance to lower courts or municipal regulators or the owners of outdoor advertising businesses or those who wish to make use of this mode of communication. It is time for clarity, and this case presents a prime opportunity

for the Court to reconsider the issues. As two noted observers put it, "whether change is necessary, and if so what kind, are questions that deserve serious thought." (Hon. Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 Tex. L. Rev. 747, 748 [1993].)[3] (See also *Rappa*, 18 F.3d at 1080 [Alito, J., concurring and noting the need to wait "[u]ntil the Supreme Court provides further guidance concerning the constitutionality of sign laws"].)

In the quarter-century that has elapsed since *Metromedia*, the communications industry has progressed along with the rest of society. Where *Metromedia* had its focus on more traditional "billboards," this case is directed at the more recent advent of "tall wall" signs, i.e., signs installed on entire exterior walls of commercial buildings.

As *Metromedia* aptly notes, "each medium of communication creates a unique set of First Amendment problems." (453 U.S. at 517.)[4]

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[3] Perhaps with some degree of understatement, they note that reading commentary in this field leaves one "with the unsettling feeling that developments in communications may have outpaced developments in the law." (Kozinski & Banner, 71 Tex. L. Rev. at 747.)

[4] The Court reiterated Justice Jackson's conclusion that each mode of communicating ideas is "a law unto itself" and that law must reflect the "differing natures, values, abuses and dangers" of each method. (*Metromedia*, 453 U.S. at 501, quoting *Kovacs v. Cooper*, 336 U.S. 77, 97 [1949].)

Consequently, the Court "has often faced the problem of applying the broad principles of the First Amendment to unique forums of expression." (453 U.S. at 500.) Somewhat presciently, the *Metromedia* plurality noted that the billboards with which it dealt constituted only a subset of the entirety known as "outdoor advertising." (453 U.S. at 501, n. 9.) The "tall walls" involved at bench are a new form and forum of expression, warranting review in their own right. Coupled with this new mode of communication, the lack of clarity in First Amendment jurisprudence relating to outdoor advertising goes on, *Metromedia* notwithstanding, thus amply warranting certiorari review.

A.

Lower Courts Are Confused Whether *Metromedia* Is Binding Precedent And, If So, How To Determine What It Means

Metromedia involved an ordinance of the City of San Diego that sought to do away with "off-site" advertising. A sign advertising business being done on the premises to which it is attached is called an "on-site" sign. Those were permitted. All signs advertising goods or services or sentiments not directly connected to the site were banned, as were non-commercial signs even if expressing the opinions of the owner of the site.

The billboards regulated in *Metromedia* had two aspects: the physical structure itself and the

message displayed on it. Even so, the regulation was justified only on the grounds that it was necessary to regulate the non-communicative aspect of billboards as free-standing structures. (*Metromedia*, 453 U.S. at 502.) However, that justification has no relevance to the present case, where the signage is affixed to the side of a building and this city approved the construction of the building and previously allowed signage on the building when the original art murals were placed on it. Thus, the regulation here is simply based on the content of the signs when the copy was changed.

This Court struck down the San Diego ordinance, but could not agree on a rationale. Even when (as discussed hereafter) courts have parsed the five resulting opinions in an effort to discern whether there were any precepts on which five Justices agreed, the task proved Herculean. For some, it proved impossible. The late Chief Justice lamented that it was "a genuine misfortune to have the Court's treatment of the subject be a virtual Tower of Babel, from which no definitive principles can be clearly drawn." (*Metromedia*, 453 U.S. at 569; Rehnquist, C.J., dissenting.)

Quite simply, lower courts do not know what to make of *Metromedia*. Some have simply "adopted" the plurality opinion. (E.g., *National Advertising Company v. Town of Niagara*, 942 F.2d 145, 147 [2d Cir. 1991]; see *Ackerley Communications v. Krochalis*, 108 F.3d 1095, 1096 [9th Cir. 1997].) That may be the path of least resistance, but it

remains difficult to discern the case's "holding." Others refer to the plurality opinion as "dictum," "not binding precedent," wonder what exactly was "endorsed by a majority of the Court" (*Cleveland Area Bd. of Realtors v. City of Euclid*, 88 F.3d 382, 387 [6th Cir. 1996]) or opine (after 21 pages extensively parsing the various *Metromedia* opinions) that it was "badly splintered," "has little precedential effect," and conclude that "it is difficult to divine what, if any, principles from *Metromedia* became the governing standard for future cases, i.e., 'the law of the land.'" (*Rappa*, 18 F.3d at 1047, 1057.) In a concurring and dissenting opinion in *Rappa*, Judge Garth conceded that *Metromedia* was "not a model of clarity," but believed that enough could be drawn from it to make it "controlling authority." (18 F.3d at 1081; concurring & dissenting opinion.) Judge Alito believed that "further guidance" was needed from this Court. (18 F.3d at 1080; concurring opinion.)

The difficulties facing lower courts by the lack of a clear majority opinion in *Metromedia* have some of them reduced to attempting to count noses (after parsing the starkly differing analyses in the five opinions) to determine which precepts (if any) obtained the agreement of five Supreme Court Justices. (E.g., *Discovery Network, Inc. v. City of Cincinnati*, 946 F.2d 464, 470, n. 9 [6th Cir. 1991], *aff'd sub nom. City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 [1993]; *Pagan v. Fruchey*, 492 F.3d 766, 779-780; en banc; dissenting opinion [6th Cir. 2007].)

Others find that such counting in an effort to develop a "matrix predicting results would produce a system of low level, fairly predictable, formal rules but a system not rooted in any consistent constitutional values." (*Rappa*, 18 F.3d at 1060, n. 24.) "Simply stated, the plurality and the concurrence took such markedly different approaches . . . that there is no common denominator between them." (*Id.* at 1058.) In a word, any attempt to derive a rule would be "unprincipled." (*Id.* at 1060.)

There is also an issue about the extent to which the *Metromedia* plurality has been questioned, albeit not overruled, by later decisions. For example, in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 425 (1993), the Court refused to uphold a decision based on a distinction granting a higher status to non-commercial speech, although that distinction had been seen as important by the *Metromedia* plurality (453 U.S. at 506).

Although unable to "derive a governing standard" from *Metromedia*, the Third Circuit held out some hope that the pending decision in *Gilleo v. City of Ladue*, 986 F.2d 1180 (8th Cir.), *cert. granted* 510 U.S. 809 (1993), "at least offers the Court the opportunity to clarify and rectify the problems created by its splintered opinion in *Metromedia*, as evidenced by the foregoing 21 pages of discussion. We hope that the Court will do so." (*Rappa*, 18 F.3d at 1061, n. 28.) Those problems extend beyond lower courts, reaching the legislative

bodies and citizens that need to know the limits of the government's regulatory power. The presence of such a splintered group of opinions also leaves lower courts waiting for this Court to reconsider the matter. (*Rappa*, 18 F.3d at 1060, n. 24.)

Whether one likes them or not, billboards and kindred signs are an important medium of communication, and people in the communications business — as well as those who use it and those who regulate it — should be able to say what they may and may not do.

B.

Even This Court Has Trouble Interpreting *Metromedia*

The Court has, itself, been reduced to parsing the *Metromedia* opinions and counting votes to see if some precept might have been accepted by at least five Justices. However, given the fragmented nature of the *Metromedia* viewpoints, even the members of the Court have not always been able to agree on how to count the *Metromedia* votes and what they collectively mean. (See *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 806, 811, n. 28 [1984]; *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 425, n. 20 [1993]; *City of Ladue v. Gilleo*, 512 U.S. 43, 49-50 [1994].)

Despite the Third Circuit's hope expressed in *Rappa*, that the decision now known as *City of Ladue v. Gilleo*, 512 U.S. 43 (1994) would resolve

the *Metromedia* problems, *Ladue* did not do it. In fairness, its facts did not allow the Court to deal with the broader issues facing the outdoor advertising industry, as *City of Ladue* dealt only with small signs (the kind that typically sprout on suburban lawns and windows during political campaigns) placed on residential properties by their inhabitants.[5] Thus, the opinion was concerned with restricting the liberty of citizens to speak in (or from) their own homes (512 U.S. at 58) in a simple and inexpensive manner (512 U.S. at 56-57). Given the breadth of the ban imposed by the city, the Court believed that less restrictive alternatives were available. *City of Ladue* turned out not to be the vehicle in which to revisit the issues raised, but left in turmoil, in *Metromedia*.

C.

The Court's Earlier Decisions Upholding Aesthetic Regulation All Had A Public Safety Rationale And Were Not Purely Aesthetic

Although it is true that the Court has emphasized the importance of allowing cities the leeway to regulate for aesthetic purposes, it is also true that each of the First Amendment decisions *also* involved a public safety basis for the regulation. This is the first case presenting

[5] As *Metromedia* itself reminded, "[t]he uniqueness of each medium of expression has been a frequent refrain" in the Court's First Amendment opinions. (453 U.S. at 501, n. 8.)

aesthetics as a sole and independent reason for banning a mode of communication subject to First Amendment protection.

Metromedia itself reviewed an ordinance whose purpose was "to eliminate hazards to pedestrians and motorists brought about by distracting sign displays" as well as "to preserve and improve the appearance of the City." (453 U.S. at 493.)

Taxpayers for Vincent involved a prohibition on placing signs on public property because they constitute "a clutter and visual blight" and also create "a potential safety hazard." (466 U.S. at 794.)

Discovery Network involved a municipal effort to eliminate commercial news racks from the public streets on the grounds of "safety concerns and visual blight." (507 U.S. at 426.)

City of Ladue concerned an ordinance directed at "visual blight and clutter" as well as "safety and traffic hazards to motorists, pedestrians, and children." (512 U.S. at 43.)

Thus, to the extent that the Court's opinions talk about the importance to local government of aesthetic regulation, it is in the context of ordinances that were designed to protect public safety. The Ninth Circuit was doubly wrong in this case. It backhanded — in a single sentence — the argument that aesthetics, standing alone, could not justify the ban enacted by West Hollywood, and it asserted that the argument was "foreclosed" by

Taxpayers for Vincent. (App. A-6.) That conclusion is erroneous for at least three reasons.

First, the ordinance in *Taxpayers for Vincent* dealt with safety as well as aesthetics.[6] Second, the ordinance in *Taxpayers for Vincent* regulated only the posting of signs on *public* property, i.e., property owned by the same entity issuing the regulations.[7] Indeed, the Court likened the city's control in that case to a private citizen's right to control third party use of his or her own property. (466 U.S. at 814, n. 31.) Third, to the extent that *Taxpayers for Vincent* said that it "reaffirm[ed]" the *Metromedia* conclusion about the importance of aesthetic regulation (466 U.S. at 807), the statement was confined to the facts of both cases — both of which dealt with regulations of both public safety and aesthetics — and the fact that *Taxpayers for Vincent* involved only "an accumulation of signs posted on public property" (466 U.S. at 807). If the Court intended to go beyond the common facts of both cases, it would have been purely dictum. In any event, that comment cannot support the Ninth Circuit's curt dismissal of Petitioner's argument.

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[6] *Taxpayers for Vincent* was based on the Court's acceptance of the fact that "the city has a sufficient basis for believing that billboards are traffic hazards *and* are unattractive . . . ." (466 U.S. at 817; emphasis added.)

[7] In *City of Ladue*, the Court emphasized that *Taxpayers for Vincent* involved "signs placed on public property." (512 U.S. at 54.)

II.

THE FORMULA DEVISED IN *CENTRAL HUDSON* TO EVALUATE FIRST AMENDMENT ISSUES NEEDS TO BE RECONSIDERED, AS IT IS SUBJECT TO ABUSIVE APPLICATION THAT ALLOWS WHOLESALE SUPPRESSION OF SPEECH

Central Hudson set forth a plausible-sounding four-part test regarding the regulation of commercial speech. (1) Fundamentally, the speech must be lawful and not misleading. If so, regulation is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) goes no further than necessary. (*Central Hudson*, 453 U.S. at 507.)

In the first place, this test was only intended to apply to restrictions on certain specific forms of commercial speech and not to regulations designed to entirely prohibit commercial and non-commercial speech, like the West Hollywood ordinance here.

Further, although the test is easy to state, it offers no more than anecdotal guidance. As can be seen from both the case at bench and from others decided using the *Central Hudson* formula, the test can yield almost any result, depending on the result desired by the reviewing body. The sheer number of cases (many of which are discussed hereafter) in which parties have had to litigate all the way to this Court to obtain a definitive

weighing of those factors should demonstrate that the formula is flawed.

Indeed, various members of the Court have criticized the test, as have lower courts and commentators. (See, e.g., authorities cited in *Thompson v. Western States Medical Center*, 535 U.S. 357, 367-368 [2002], and *Greater New Orleans Broadcasting Assn., Inc. v. United States*, 527 U.S. 173, 184, n. 3 [1999]. See also *44 Liquormart*, 517 U.S. at 520-521 [Scalia, J., concurring and collecting authorities]; *id.* at 523 [Thomas, J., concurring and discussing shortcomings of *Central Hudson*].) As noted by the Court, "reasonable judges may disagree" about what to do with the test (*Greater New Orleans*, 527 U.S. at 184), but clearly there are situations in which its flaws are evident. Cases like this one — where the government's professed interest is solely aesthetic, and thus personal to those on the city council that voted for it — require a different approach.

Questions were generated about *Central Hudson* starting with the decision itself. The opinion drew not only a dissent, but three separate opinions concurring only in the judgment and expressing concerns that the test "does not provide adequate protection for truthful, nonmisleading, noncoercive commercial speech" (447 U.S. at 573; Blackmun, J., concurring).

In *Discovery Network*, the Court rejected an effort to expand the reach of *Central Hudson* to essentially give cities the ability to declare open

season on commercial speech. In rejecting the city's request to simply ban all commercial news racks on aesthetic grounds, the Court drew a line. It required proof from the city. A mere assertion of safety concerns would not suffice, in light of the evident fact that all news racks would have the same impact, whether commercial or not. The only difference was the content of the papers delivered and that would not suffice.

A month after *Discovery Network*, the Court decided *Edenfield v. Fane*, 507 U.S. 761 (1993), striking down a ban on direct client solicitation by CPAs. The Court emphasized the important "societal interests in broad access to complete and accurate commercial information" and concluded that "the speaker and the audience, not the government, assess the value of the information presented." (507 U.S. at 766, 767.)[8] Importantly, the Court also held that *Central Hudson* review restricts the reviewing court to the statement of reasons expressed by the regulator — unlike rational basis review in which the courts are free to conjecture their own rationales. (507 U.S. at 761.) To the same effect is *Thompson,* 535 U.S. at 374 (*Central Hudson* test is "significantly stricter than the rational basis test").

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[8] See also *Thompson*, 535 U.S. at 375, rejecting a "paternalistic approach" to restricting the free flow of information.

Even after *Discovery Network* and *Edenfield*, some courts expressed concern about "the incredible breadth of the *Central Hudson* test if taken to its literal extremes . . . ." (*Commodity Trend Service, Inc. v. Commodity Futures Trading Commn.*, 149 F.3d 679, 684-685 [7th Cir. 1998].) By contrast, the Ninth Circuit has no such concern, as demonstrated by opinions like the one presented here and *Ackerley*, 108 F.3d at 1099.

The problem surfaces in decisions like the one below, where the Ninth Circuit engaged in tautology, rather than analysis, to conclude that the *Central Hudson* criteria were met. Neither that court nor the District Court required any proof from the City that there was a sufficient need to ban tall wall signs from all parts of the City not having Sunset Boulevard addresses. The City simply asserted its aesthetic beliefs and the Ninth Circuit found that sufficient. (App. A-6.)

In contrast are cases like *Pagan v. Fruchey*, 492 F.3d 766 (6th Cir. 2007; en banc). There, a city sought to ban "for sale" signs posted on automobiles parked on city streets. The stated justifications were both traffic safety and aesthetics. As there was no evidence to support the safety rationale, the city was left with its insistence that its interest in aesthetics was sufficient to justify the ban. In a manner very similar to West Hollywood at bench, the city sought to attribute "some talismanic quality" to aesthetics that would essentially give it a free pass under *Central Hudson*. (492 F.3d at 776.) The Sixth Circuit refused. Nor would the

Sixth Circuit accept that *Taxpayers for Vincent* had loosed municipalities to regulate signs based solely on aesthetics:

> "[R]ecognition of aesthetics as a substantial governmental interest tells us nothing about how to resolve this case. *Vincent* certainly does not suggest, either explicitly or implicitly, that, in examining restrictions on commercial speech, aesthetic interests are to be treated differently from other governmental interests." (492 F.3d at 776.)

The Ninth Circuit said the case began and ended with West Hollywood's aesthetic interests — and it thought *Taxpayers for Vincent* instructed it to do so. (App. A-6.) That is both wrong and in conflict with the Sixth Circuit.

The problem began in *Metromedia* itself. The plurality opinion demonstrated the mischief inherent in an expansive reading of the *Central Hudson* test. There, the governmental interest was twofold. The billboards were said to be both traffic hazards and unattractive. The Court concluded that the "twin goals" were substantial and that a ban was the most effective way to satisfy them, thus essentially collapsing the second, third and fourth *Central Hudson* steps into each other:

> "If the city has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously the most direct and perhaps the only effective

> approach to solving the problems they create is to prohibit them. The city has gone no further than necessary in seeking to meet its ends." (*Metromedia*, 453 U.S. at 508.)

The vice in the formula is demonstrated here, where West Hollywood's only complaint about these signs is that — in a generic sense — they offend the aesthetic sense of three members of the city council at a specific time. Beauty may be in the eye of the beholder, but for a city to ban an entire mode of communication simply because it doesn't like the general look (*Central Hudson* step 2) then that becomes the justification for a ban (step 3) which is obviously the most effective way to "solve" the "problem" by simply eliminating all such signs and such a ban is said to go no further than necessary (step 4) because (tautologically) the ban is the only way to "solve" the "problem." In fact, that is precisely the rationale used by the Ninth Circuit to uphold this broad brush prohibition on tall wall signs. (App. A-6.)

That approach can no longer stand without question. The combination of the confusion wrought by *Metromedia* and the extremely broad reach of *Central Hudson* when (as here) taken literally is deadly to the First Amendment. That combination allows a court to approve total elimination of a medium of communication on a purely subjective — virtually unreviewable — basis. In *Edenfield*, the Court itself noted that, under an expansive reading of *Central Hudson*, "the protection afforded commercial speech would

be reduced almost to nothing." (507 U.S. at 777.) Evidently, *Central Hudson* requires reconsideration. It is essential to end the kind of simplistic analysis used by the Ninth Circuit in this case. The toxic combination of *Metromedia* confusion and *Central Hudson* expansiveness must be ended.

III.

THE DEFINITION OF PROPERTY IS A MATTER OF STATE LAW. A CIRCUIT COURT HAS NO JURISDICTION TO CREATE ITS OWN DEFINITION IN ORDER TO REJECT A REGULATORY TAKING CLAIM

The District Court found that the City's actions took Petitioner's property in violation of the Fifth Amendment. (App. D-28-32.) In doing so, that court applied, as required, California's definition of property. It is settled that the Fifth Amendment does not create property rights, but protects those rights recognized as property by the states. (E.g., *Warren v. City of Athens*, 411 F.3d 697, 708 [6th Cir. 2005]; *Daniels v. Area Plan Commn.*, 306 F.3d 445, 459 [7th Cir. 2002]; *Weinberg v. Whatcom County*, 241 F.3d 746, 753 [9th Cir. 2001].)

The issue was whether Petitioner had the right to place "advertising" on the tall walls of its building. If so, then that right was protected property. The California Supreme Court has defined "advertising" in the broadest possible terms:

> "Although the term 'advertising' may imply a commercial message, it is not, in the ordinary usage, limited to such message. 'Advertising' is simply 'the action of calling something . . . to the attention of the public.' [Citation.] We speak of 'political advertising,' and even of 'personal advertising.' Thus, in common usage a billboard bearing a political or even a personal message would be considered an 'advertising display sign.'" (*Metromedia, Inc. v. City of San Diego*, 32 Cal.3d 180, 188, 185 Cal.Rptr. 260 [1982].)[9]

Rather than deal with the regulatory taking issue raised by the City's actions, the Ninth Circuit re-examined the question whether, by placing an art mural on one of the tall walls of its building, Petitioner engaged in "advertising" and thereby owned a property interest protected by State law regardless of whether the sign in question was designed to sell anything. In the California Supreme Court's words, it was "the action of calling something . . . to the attention of the public." (32 Cal.3d at 188.) Without reference to California law, the Ninth Circuit simply asserted that "[w]hatever the scope of that term, we do not construe it to encompass an art mural erected for purely aesthetic purposes." (App. A-4.)

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[9] The California Supreme Court's decision came after remand from this Court's *Metromedia* decision.

That was improper because it ignored established California law. The Ninth Circuit had no jurisdiction to decide aspects of California law in disregard of its clear determination by that State's highest court. The issue was directly brought to the attention of the entire Ninth Circuit in the Petition for Rehearing En Banc, but no change was made in the opinion and no Judge voted for en banc rehearing. The decision conflicts with each of the other Circuit decisions cited above by usurping the definition of property under State law.

CONCLUSION

It is time for this Court to seriously reconsider the First Amendment issues applicable to the outdoor advertising industry that were raised, but not decisively answered, in *Metromedia*. The confusion about how to deal with *Metromedia* haunts the lower courts to this day. *Central Hudson* only confounds matters.

Petitioner prays that certiorari be granted to deal with these issues once and for all.

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BEVERLY BOULEVARD LLC, a California limited liability company, Plaintiff-Appellee, v. CITY OF WEST HOLLYWOOD, a California municipal corporation; WEST HOLLYWOOD COMMUNITY REDEVELOPMENT COMMISSION, a political subdivision of the City of West Hollywood, Defendants-Appellants.	No. 05-55961 D.C. No. CV-01-05630-JFW MEMORANDUM*

BEVERLY BOULEVARD LLC, a California limited liability company, Plaintiff-Appellant, v.	No. 05-55970 D.C. No. CV-01-05630-JFW

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

CITY OF WEST HOLLYWOOD, a California municipal corporation; WEST HOLLYWOOD COMMUNITY REDEVELOPMENT COMMISSION, a political subdivision of the City of West Hollywood,

Defendants-Appellees.

BEVERLY BOULEVARD LLC, a California limited liability company,

Plaintiff-Appellant,

v.

CITY OF WEST HOLLYWOOD, a California municipal corporation; WEST HOLLYWOOD COMMUNITY REDEVELOPMENT COMMISSION, a political subdivision of the City of West Hollywood,

Defendants-Appellees.

No. 05-56384

D.C. No. CV-01-05630-JFW

Appeal from the United States District Court for the Central District of California
John F. Walter, District Judge, Presiding

Argued and Submitted May 16, 2007
Pasadena, California

(Filed June 5, 2007)

Before: FISHER and CLIFTON, Circuit Judges, and FOGEL, District Judge.**

The City of West Hollywood appeals the district court's grant of summary judgment in favor of Beverly Boulevard, LLC, with regard to one of Beverly's claims for declaratory and injunctive relief based on the Fifth Amendment Takings Clause. Beverly cross-appeals the district court's grant of summary judgment in favor of the City with regard to Beverly's other takings claim and Beverly's claim under the First Amendment. Also before us are cross-appeals of the district court's award of attorney's fees to Beverly.

I. Fifth and Fourteenth Amendment Takings Claims

We need not resolve whether this claim is ripe under the standards articulated in *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City,* 473 U.S. 172 (1985). *Williamson* sets forth a prudential rule, *see Suitum v. Tahoe Reg'l Planning Agency,* 520 U.S. 725, 733-34 & n.7 (1997), and we may therefore assume without deciding that the takings claims are ripe in order to reject them on the merits. *See Weinberg v. Whatcom County,* 241 F.3d 746, 752 n.4 (9th Cir. 2001); *accord Grubbs v. Bailes,* 445 F.3d 1275, 1281 (10th Cir. 2006).

** The Honorable Jeremy D. Fogel, United States District Judge for the Northern District of California, sitting by designation.

Beverly has failed to establish a protectable property interest. The Warhol mural did not contain "advertising" within the meaning of California's Outdoor Advertising Act. *See* Cal. Bus. & Prof. Code § 5412. Whatever the scope of that term, we do not construe it to encompass an art mural erected for purely aesthetic purposes. The doctrine of constitutional avoidance does not counsel otherwise. First, the term "advertising" in § 5412 is not ambiguous in a manner that permits this court to construe it as reaching decorative displays. *See United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 494 (2001) (holding that constitutional avoidance "has no application in the absence of statutory ambiguity"). Second, we are not convinced that construing "advertising" in the broad manner advocated by Beverly would avoid more constitutional dilemmas than it would create, given that term's repeated use throughout the Outdoor Advertising Act. We therefore affirm the district court's conclusion that Beverly had no protectable property interest in the mural on the west wall.

The Veterans mural on the east wall did contain advertising, but it was not "lawfully erected" under § 5412. The City did not concede that the Veterans mural was lawfully erected. Both Lisa Heep's letter and the City's briefs in the district court plainly made only a conditional concession: that *if* the murals contained no letters intended to advertise *then* they would be lawful. Heep's mistake regarding the premise (that the Veterans mural contained no letters

intended to advertise) did not amount to a concession regarding the legal conclusion (that it was lawfully erected) relied upon by the district court. Moreover, Beverly has failed to demonstrate that "serious injustice" would result if the City were not held to Heep's mistaken belief that the east wall mural did not contain letters intended to advertise. *See S & M Inv. Co. v. Tahoe Reg'l Planning Agency,* 911 F.2d 324, 329 (9th Cir. 1990). We accordingly reverse the district court's ruling with regard to the takings claim based on the east wall mural and vacate the judgment and equitable relief granted below.

II. First Amendment Claims

The City did not violate the First Amendment either in adopting the new sign ordinance, *see* West Hollywood Municipal Code §§ 19.34.010 et seq., or in applying that ordinance to Beverly. Beverly failed to raise in its opening brief its argument that the new ordinance facially discriminates between commercial and noncommercial tall walls. That argument is therefore waived. *See Smith v. Marsh,* 194 F.3d 1045, 1052 (9th Cir. 1999). With regard to Beverly's as-applied challenge, Beverly has cited no evidence from which a reasonable juror could conclude that the City applied the new ordinance's tall wall restrictions only to commercial speech. Nothing in the timing of the citations suggested discriminatory enforcement: the new ordinance went into effect on May 1, 2001 and the City cited Beverly immediately thereafter in June 2001. Nor did the City concede below that it had been

applying the ordinance only to commercial tall walls. We therefore assume that the new sign ordinance applies equally to noncommercial and commercial speech.

Beverly's argument that the City's aesthetic interest, unless coupled with a traffic safety interest, is not sufficiently substantial under the test articulated in *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980), is foreclosed by *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 807 (1984).

We agree with the district court that the new sign ordinance "directly advances the governmental interest asserted." *See Central Hudson*, 447 U.S. at 566. The City submitted evidence that the sign code's restrictions on commercial tall walls sought to preserve and augment the differing characters of Sunset Boulevard and other areas of the city. Moreover, "[a]s to whether the City's [aesthetic] interests are served by the Sign Code, we generally defer to the legislative body passing the law." *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1073 (9th Cir. 2006). We disagree with Beverly that the sign code is internally inconsistent in encouraging tall wall commercial speech on Sunset Boulevard and generally prohibiting it elsewhere. The City's goal is to channel such speech to Sunset Boulevard, which is known for its flamboyant billboards, while simultaneously maintaining a more reserved aesthetic elsewhere.

Finally, the new tall wall restrictions are "no more extensive than is necessary to serve" the City's interest. *Central Hudson,* 447 U.S. at 566. Beverly has not shown that there could be less restrictive means for the city to accomplish its legitimate goals.

III. Fees

We dismiss the attorney's fees appeals as moot.

AFFIRMED IN PART, REVERSED AND VACATED IN PART, DISMISSED IN PART.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BEVERLY BOULEVARD, LLC, a California limited liability company, Plaintiff, v. CITY OF WEST HOLLYWOOD, a California municipal corporation; and CITY OF WEST HOLLYWOOD COMMUNITY DEVELOPMENT DEPARTMENT, a political subdivision of the City of West Hollywood, Defendants.	Case No. 01-5630 JFW (AJWx) **JUDGMENT AND ORDER FOR PERMANENT INJUNCTION** (Filed May 24, 2005)

Pursuant to this Court's April 15, 2005 Order Granting in Part and Denying in Part Plaintiff's Motion for Partial Summary Judgment or Specification of Issues Without Substantial Controversy [filed 1/31/05] and Order Granting in Part and Denying in Part Defendants' Motion for Summary Judgment or in the Alternative for Summary Adjudication of Issues [filed 1/28/05], and the court having found that Plaintiff has a protected property interest in the mural sign currently maintained on the East wall of the Beverly Boulevard Building, located at 8899 Hollywood Boulevard, West Hollywood, California ("Beverly Boulevard Building"),

JUDGMENT IS HEREBY ENTERED as follows:

1. Judgment is rendered in favor of Plaintiff on the First Claim for Relief of Plaintiff's Complaint with respect to the mural sign located on the East Wall of the Beverly Boulevard Building ("East Wall Mural Sign") and this Court specifically declares and decrees that: (1) Plaintiff has acquired a protected property right to maintain the East Wall Mural Sign in its same size and dimensions, and otherwise in compliance with the city's Sign Ordinance, including the right to change copy on said sign free from interference from Defendants, (2) as a protected property right, Defendants may not require a permit or otherwise interfere with Plaintiff's right to maintain and change copy on the East Wall Mural Sign without payment of compensation, (3) any attempt by defendants to require a permit or otherwise interfere with Plaintiff's right to maintain and change copy on the East Wall Mural Sign without payment of compensation shall constitute an unlawful "taking" of property in violation of Plaintiff's rights under the Fifth and Fourteenth Amendments to the United States Constitution and is hereby declared to be void, invalid and unconstitutional, and (4) Defendants may not enforce the citations issued against Plaintiff with respect to the East Wall Mural Sign;

2. As further relief under the First Claim for Relief of Plaintiff's Complaint, Defendants CITY OF WEST HOLLYWOOD and the CITY OF WEST HOLLYWOOD COMMUNITY DEVELOPMENT DEPARTMENT and their respective officers, agents, servants,

employees, attorneys, and all persons acting in concert or participation with them, are hereby permanently enjoined and restrained from requiring Plaintiff to obtain a permit for the East Wall Mural Sign or from otherwise interfering in any fashion, directly or indirectly, with Plaintiff's right to maintain and change copy East Wall Mural Sign without payment of compensation;

3. Judgment is rendered in favor of Defendants on the First Claim for Relief of Plaintiff's Complaint with respect to the mural sign located on the West Wall of the Beverly Boulevard Building;

4. Judgment is rendered in favor of Defendants on the Second, Third and Fourth Claims for Relief of Plaintiff's Complaint and Plaintiff shall take nothing as to these claim [sic];

5. Any application for costs, and attorneys' fees, if appropriate, shall be made pursuant to Rule 54, Federal Rules of Civil Procedure.

Dated: May 23, 2005

/s/ John F. Walters
Honorable John F. Walters, Judge
United States District Court

Submitted by:

GARY S. MOBLEY,
A PROFESSIONAL CORPORATION

By: /s/ Gary S. Mobley
Gary S. Mobley
Attorneys for Plaintiff
BEVERLY BOULEVARD, LLC

APPROVED AS TO FORM AND CONTENT
CITY OF WEST HOLLYWOOD
City Attorney's Office

By: /s/ John C. Cotti
John C. Cotti
Attorneys for Defendants
CITY OF WEST HOLLYWOOD,
and CITY OF WEST HOLLYWOOD
COMMUNITY DEVELOPMENT
DEPARTMENT

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 2030 Main Street, Suite 1050, Irvine, California, 92614-6232.

On **May 23, 2005**, I served the foregoing document described as **JUDGMENT AND ORDER FOR PERMANENT INJUNCTION** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Michael Jenkins, Esq.
City Attorney, City of West Hollywood
Christi Hogin, Esq.
John C. Cotti, Esq.
Jenkins & Hogin, LLP
Manhattan Towers
1230 Rosecrans Ave., Suite 100
Manhattan Beach, CA 90266

[X] **BY MAIL:** The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Irvine, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after service of deposit for mailing in affidavit.

[ ] **BY PERSONAL SERVICE:** The envelope was delivered by hand to the parties stated above.

[ ] **BY OVERNIGHT COURIER:** The envelope was delivered to Federal Express for delivery to the above address.

[ ] **BY FACSIMILE:** The foregoing document was transmitted to the above-named person(s) by facsimile transmission from (949) 955-1125 before 5:00 p.m. on said date, and the transmission was reported as complete and without error.

Executed on **May 23, 2005**, at Irvine, California.

[ ] (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

[X] (Federal) I declare that I am employed in the office of a member of the bar of this court at whose discretion the service was made.

/s/ Barbra J. Burton
Barbra J. Burton

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

PRIORITY SEND

Date: April 15, 2005

Case No. **CV 01-5630-JFW (AJWx)**

Title: BEVERLY BOULEVARD, LLC *-v-* CITY OF WEST HOLLYWOOD, et al.

DOCKET ENTRY

PRESENT: HONORABLE JOHN F. WALTER, UNITED STATES DISTRICT JUDGE

Shannon Reilly **Courtroom Deputy**	**None Present** **Court Reporter**
ATTORNEYS PRESENT FOR PLAINTIFFS: **None**	**ATTORNEYS PRESENT FOR DEFENDANTS:** **None**
PROCEEDINGS (IN CHAMBERS):	**ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT OR SPECIFICATION OF ISSUES WITHOUT SUBSTANTIAL CONTROVERSY [filed 1/31/05];**

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE FOR SUMMARY ADJUDICATION OF ISSUES [filed 1/28/05]

On January 31, 2005, Plaintiff Beverly Boulevard, LLC ("Plaintiff") filed a Motion for Partial Summary Judgment or Specification of Issues Without Substantial Controversy. On February 17, 2005, Defendants City of West Hollywood and West Hollywood Community Development Department ("Defendants") filed their Opposition. On February 22, 2005, Plaintiff filed a Reply.

On January 28, 2005, Defendants filed a Motion for Summary Judgment or in the Alternative for Summary Adjudication of Issues. On February 17, 2005, Plaintiff filed its Opposition. On February 25, 2005, Defendants filed a Reply.

Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court found these matters appropriate for submission on the papers, without oral argument. The matters were, therefore, removed from the Court's February 28, 2005 hearing calendar and the parties were given advance telephonic notice.

On March 4, 2005, the Court issued an Order directing the parties to file simultaneous supplemental briefs which address the limited issue of whether California Business and Professions Code Section 5271 precludes the application of the Outdoor Advertising Act to this case. On March 9, 2005, Plaintiff filed a Supplemental Brief Re Applicability of Section 5271 of the California Outdoor Advertising Act to Plaintiff's Motion for Partial Summary Judgment. On March 9, 2005, Defendants also filed a Supplemental Brief in Response to Court's March 4, 2005 Request for Supplemental Brief.

On March 31, 2005, the Court issued an Order directing the parties to file further supplemental briefing on Plaintiff's claim that the New Sign Ordinance is unconstitutional "as-applied" to Plaintiff under the First Amendment. Plaintiff filed a Supplemental Brief Re First Amendment "As-Applied" Challenge in Plaintiff's Motion for Partial Summary Judgment on April 6, 2005. On April 11, 2005, Defendants filed a Brief in Response to Plaintiff's Brief Re As-Applied Challenge Per Court's March 31, 2005 Request for Supplemental Brief.

After considering the moving, opposing, reply and supplemental papers and the arguments therein, as well as the evidence submitted in support of and in opposition to both motions, the Court rules as follows:

I. FACTUAL BACKGROUND

On September 15, 2000, Plaintiff erected two multi-story murals/signs on the East and West walls of a commercial office building located at 8899 Beverly Boulevard (the "Beverly Boulevard Building") in the City of West Hollywood (the "City"). The mural on the West wall of the Beverly Boulevard Building was a collage consisting of an image of a Campbell's soup can and the likenesses of Marilyn Monroe and Andy Warhol (the "Warhol Mural"). *See* Decl. of M. McNeilly at Exhibit 2A. The sign on the East wall of the Beverly Boulevard Building was a collage of patriotic images, including the Statue of Liberty, the Declaration of Independence, and the Iwo Jima War Memorial, and was designed to advertise and promote the City's Veteran's Memorial Fund, a non-profit fund created by the City to establish a war memorial in the City (the "First Memorial Fund Sign"). *See id.* at Exhibit 2B. The internet address for the City's Veteran's Memorial Fund was included on the bottom of the First Memorial Fund Sign. *See id.*

In December of 2000, the City's Code Enforcement Division investigated the Warhol Mural and First Memorial Fund Sign to determine whether they complied with the City's sign ordinance in effect at the time (the "First Sign Ordinance"). Under the First Sign Ordinance, a "sign" was defined as:

> any object, device, display or structure, or part thereof, situated outdoors or indoors, which is used to identify, display, or direct or attract attention to an object, person, institution,

> organization, business, product, service, event or location by any means, including words, letters, figures, design symbols, fixtures, colors, illumination or projected image. A structure and/or the content of a structure may be a sign.

First Sign Ordinance § 19.76.020(a)(8). Pursuant to Section 19.76.080 of the First Sign Ordinance, the following signs were prohibited:

> *Off-Site Signs.* A sign which advertises goods, services or business establishments that are not available within the property lines of the property on which the sign is located, except for billboards and creative billboards on Sunset Boulevard as defined in subsections (a) and (c)(14) of Section 1916.020.

First Sign Ordinance § 19.76.080(e). However, under Section 19.76.090 of the First Sign Ordinance, "[m]urals which do not incorporate letter [sic] intended to advertise" constituted "artwork" which was excluded from the definition of "sign." First Sign Ordinance § 19.76.090(b).

At the conclusion of the City's investigation, on December 11, 2000, Lisa Heep, Planning Manager of the City's Community Development Department, sent a letter to Plaintiff in which she informed Plaintiff that the City had received complaints "regarding the erection of what appears to be mural artwork" on the sides of Plaintiff's Beverly Boulevard Building, but since "it appears that neither of these murals include

any form of advertising, such artwork is currently exempt from the sign code." Decl. of M. McNeilly at Exhibit 4. Ms. Heep warned Plaintiff that "should these murals be replaced with any form of advertising signage, this would be in violation of the Code and a citation would be issued." *Id.*

On December 28, 2000, Plaintiff changed the Warhol Mural on the West wall of the Beverly Boulevard Building to a new multi-story mural depicting a Campbell's soup can (the "Campbell's Soup Mural"). *See id.* at Exhibit 5A. Plaintiff also replaced the First Memorial Fund Sign on the East wall with a second multi-story sign regarding the City's Veteran's Memorial Fund (the "Second Memorial Fund Sign"). *See id.* at Exhibit 5B. The Second Memorial Fund Sign was entitled "West Hollywood Veterans Memorial Fund" and pictured the Statue of Liberty with some colored flags. *See id.* The Internet address for the City's Veteran's Memorial Fund was again included at the bottom of the sign. *See id.* The Second Memorial Fund Sign incorporated artwork that had been provided by the City, and the City distributed posters of the sign to the public. *See id.* at ¶¶ 17-19. In January of 2001, City Councilman Sal Guarrillo congratulated the artist who created the sign stating that the new "tall wall" was "impressive." *See id.* at Exhibit 6B. The Second Memorial Fund Sign remained on the Beverly Boulevard Building for over four months without objection from the City.

In May of 2001, the City passed a new sign ordinance (the "New Sign Ordinance") which repealed

Section 19.67.090 of the First Sign Ordinance. Section 19.34.080 of the New Sign Ordinance governs "Off-Site Signs" and provides in relevant part that:

> Conditional Use Permit approval shall be required for use of any wall proposed to be used for tall wall signs including those that have been used for tall wall signs prior to May 2, 2001. Once a Conditional Use Permit has been granted, the tall wall image may be changed subject to a Zone Clearance.

New Sign Ordinance § 19.34.080(l). Under Section 19.34.090 of the New Sign Ordinance, "Off-site signs not specifically allowed by the provisions of Section 19.34.080" are prohibited. New Sign Ordinance § 19.34.090.

On June 1, 2001, Plaintiff replaced the Campbell's Soup Mural with a multi-story advertisement for the movie Jurassic Park III (the "Jurassic Park Sign"). *See* Decl. of M. McNeilly at Exhibit 8. On June 11, 2001, the City issued three citations to Plaintiff. *See id.* at Exhibit 9. Tom Benedetti, the City Code Enforcement Officer that issued the citations, determined that the Second Memorial Fund Sign and the Jurassic Park Sign constituted advertising and were "tall walls" which violated Section 19.34.080(l) of the City's New Sign Ordinance. *See* Decl. of T. Benedetti at ¶¶ 7-8. Citation number 210283 was a warning for Plaintiff's failure to obtain a sign permits [sic] for either "tall wall" under Section 19.34.100. Citation number 210284 ordered Plaintiff to pay a fine for violating Section 19.34.080(l) with the Jurassic Park

Sign. Citation number 210285 was a warning issued for violating Section 19.34.080(l) with the Second Memorial Fund Sign.

On July 25, 2001, Plaintiff filed a request for an administrative hearing claiming that the signs were "grandfathered" under the First Sign Ordinance in effect at the time the signs were originally erected, and that the change in content to commercial advertising was merely a "change in copy." A hearing was held on November 29, 2001. On December 11, 2001, the hearing officer issued a decision upholding the City's citations. *See id.* at Exhibit E. Specifically, the hearing officer found that the Jurassic Park Sign was a tall wall erected without a conditional use permit in violation of 19.34.080(l) and upheld Citation 210284, which fined Plaintiff one thousand dollars for the Jurassic Park Sign. The hearing officer also found that the citation did not violate California Business and Professions Code Section 5412. The hearing officer found that the Warhol Mural, which was erected prior to the Jurassic Park Sign, was not an advertising display within the meaning of Section 5412. Finally, the hearing officer found that Citations 210283 and 210285 were not the proper subject of an administrative hearing because they were only warnings.

II. PROCEDURAL BACKGROUND

On June 26, 2001, Plaintiff filed a Complaint with this Court alleging the following four claims for

relief under 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201 and 2202: (1) declaratory and injunctive relief based on Defendants' alleged violation of Plaintiff's right to free speech under the First Amendment and property rights under the Fifth and Fourteenth Amendments by requiring Plaintiff to obtain a new permit each time it desires to change the message on its signs and by otherwise attempting to enforce the New Sign Ordinance against Plaintiff; (2) declaratory and injunctive relief based on Defendants' alleged violation of Plaintiff's rights to free speech under the First Amendment, and due process and equal protection rights under the Fifth and Fourteenth Amendments by selectively enforcing the New Sign Ordinance based on the content of the sign; (3) declaratory and injunctive relief based on Defendants' alleged violation of Plaintiff's rights to due process and equal protection under the Fifth and Fourteenth Amendment by selectively enforcing zoning laws to prevent Plaintiff from enjoying the same rights to "tall wall" signs enjoyed by other similarly situated properties; and (4) money damages for interfering with Plaintiff's First, Fifth, and Fourteenth Amendment rights.

The parties spent more than a year litigating this case, and just prior to the close of discovery, Defendants moved for summary judgment. After a hearing, on August 5, 2002 the Court denied Defendants' Motion. Two months later, during the course of their preparation for trial, the parties reached a settlement of this matter.

On October 15, 2002, the parties entered into a Conditional Settlement Agreement and Mutual Release ("Settlement Agreement"). Pursuant to the terms of the Settlement Agreement, Plaintiff agreed "to promptly apply for and proceed with applications for a zone text amendment, conditional use permits, and any other permits and approvals that may be required by the City in order to lawfully maintain the Signs as 'tall walls' under all applicable provisions of the City's Sign Ordinance." Settlement Agreement at ¶ 1. In exchange, Defendants agreed "to use their best efforts expeditiously to process the applications by [Plaintiff] referenced in Paragraph 1 of [the Settlement] Agreement, to reasonably cooperate with [Plaintiff] in obtaining any other approvals from other governmental agencies that may be necessary to lawfully maintain the Signs as 'tall walls' and otherwise to implement the terms of [the Settlement] Agreement." *Id.* at ¶ 2.

At the request of the parties, on October 17, 2002, the Court signed a Stipulation Dismissing Action With Prejudice But Retaining Jurisdiction and Order Thereon ("Order of Dismissal"). Pursuant to the Order of Dismissal, the Court would "retain jurisdiction for a period of one year to re-open the action and restore it to the civil active list in its same procedural posture as of the present date in the event the Conditional Settlement Agreement entered into between the parties is not consummated." Order of Dismissal at 1.

Plaintiff promptly filed its application with the City for a zone text amendment and conditional use permit to authorize the "tall walls." Although the Staffs recommendation to the City Planning Commission was for approval of the proposed zone text amendment and conditional use permit, upon review of the application and after a January 16, 2003 hearing on the matter, the Planning Commission voted 5-2 to recommend to the City Council that Plaintiff's application be denied. On February 18, 2003, the City Council held a public hearing on the issue of whether it should adopt the amendment, grant Plaintiff's request for a permit, and allow the "tall walls" on the Beverly Boulevard Building. During the hearing, City Planner Amstrup presented the position of the Planning Commission to the City Council. Counsel for Plaintiff was given an opportunity to present Plaintiff's arguments in support of its application, and City Attorney Jenkins responded to questions from the Council. The Council then opened the floor to public comments. Seven residents spoke, and six representatives of various outdoor advertising companies presented their views on the issue. At the conclusion of the public comments, the Council gave Plaintiff's Counsel an opportunity to present any rebuttal arguments.

The City Council then voted to close the public session and the Council members continued to debate Plaintiff's application. After each City Council member had an opportunity to present his views on the issue, they voted on Plaintiff's application. The City

Council voted 3-2[1] to deny Plaintiff's application. In support of their decision, the City Council adopted the position of the Planning Commission and made the following findings:

> 1. Permitting Tall Wall Signs on streets other than Sunset Boulevard would detract from the unique character of Sunset Boulevard as the City's center of activity and nightlife.
>
> 2. Tall Walls are not consistent with the Avenue of the Arts character of Beverly Boulevard.
>
> 3. Tall Wall Signs which could be permitted by the proposed zone text amendment would negatively impact nearby residential properties, particularly those on the Rosewood and Ashcroft Avenues.
>
> 4. The proposed request is a policy decision that may be better addressed during the upcoming general plan review.

See Resolution No. 03-2845.

After the City Council issued its decision, the parties continued to negotiate a modification to the terms of the Agreement that would allow the settlement to be

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[1] Although the Resolution of the City Council indicates that the City voted 3-2 against Plaintiff, the transcript from the February 18, 2003 hearing indicates that the City Council actually voted 4-1 against Plaintiff, with only Mayor *pro tempore* Martin voting in Plaintiff's favor.

consummated. Accordingly, on September 29, 2003, the parties requested and the Court granted a one year extension of the Court's retention of jurisdiction to re-open the action. One year later, on September 28, 2004, the parties filed a Stipulation to Vacate Order of Dismissal and Re-Open and Restore Case to the Civil Active List and lodged a Proposed Order Thereon (collectively the "Stipulation") in which the parties represented to the Court that "[d]espite diligent efforts, the parties have been unable to reach agreement. Accordingly, the express condition precedent in the Settlement Agreement has failed, and the case needs to be re-opened and restored to the civil active list." Stipulation at ¶ 6. The Court signed the Stipulation on September 29, 2004 and the case was restored to the Court's active calendar. Shortly thereafter, Plaintiff filed a Motion to Enforce Settlement which the Court denied on January 20, 2005. The parties then filed the present cross motions for summary judgment.

III. LEGAL STANDARD

Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256

(1986). A party opposing a properly made and supported motion for summary judgment may not rest upon mere denials but "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). In particular, when the non-moving party bears the burden of proving an element essential to its case, that party must make a showing sufficient to establish a genuine issue of material fact with respect to the existence of that element or be subject to summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

An issue is genuine if evidence its produced that would allow a rational trier of fact to reach a verdict in favor of the non-moving party. *Anderson*, 477 U.S. at 248. The Court must assume the truth of direct evidence set forth by the opposing party. *See Hanon v. Dataproducts Corp.* 976 F.2d 497, 507 (9th Cir. 1992). However, where circumstantial evidence is presented, the Court may consider the plausibility and reasonableness of inferences arising therefrom. *See Anderson*, 477 U.S. at 249-50; *TW Elec. Serve Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 631-32 (9th Cir. 1987). In that regard, "a mere 'scintilla' of evidence will not be sufficient to defeat a properly supported motion for summary judgment; rather, the nonmoving party must introduce some 'significant probative evidence tending to support the complaint.'" *Summers v. Teichert & Son, Inc.*, 127 F.3d 1150, 1152 (9th Cir. 1997).

IV. DISCUSSION

A. The East Wall Of The Beverly Boulevard Building

1. Plaintiff's "Takings" Claim Under the Fifth Amendment

In its First Claim for Relief, Plaintiff claims that the City's attempt to (1) prevent Plaintiff from changing copy on the Sign on the East wall of the Beverly Boulevard Building by requiring Plaintiff to obtain new permit each time it desires to change the message on its Sign, or (2) otherwise enforce the New Sign Ordinance against Plaintiff with respect to that Sign, is an unconstitutional attempt to "deprive Plaintiff of protected property rights without compensation in violation of the Takings Clause of the Fifth [Amendment]."[2] Plaintiff's Motion at 6-7. Plaintiff argues that its property rights in its Sign on the East wall of the Beverly Boulevard Building are protected by and derived from Section 5412 of the California Outdoor Advertising Act ("OAA"), California Business & Professions Code § 5200, *et seq.* Section 5412 of the OAA provides in relevant part:

> Notwithstanding any other provision of this chapter, no *advertising display* which was *lawfully erected* anywhere within this state shall be compelled to be removed, *nor shall*

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[2] Plaintiff's claim for deprivation of property without due process brought under the Fifth and Fourteenth Amendments is addressed in Section VI.A.2, *infra*.

> *its customary maintenance or use be limited*, whether or not the removal or limitation is pursuant to or because of this chapter or any law, ordinance, or regulation of any governmental entity, without payment of compensation, as defined in the Eminent Domain Law.

Cal. Bus. & Prof. Code § 5412 (emphasis added).[3] Accordingly, in order to qualify for the protections outlined in Section 5412, a sign: (1) must constitute an "advertising display" as defined by the OAA; and (2) must have been "lawfully erected."

Relying on Section 5412, Plaintiff argues that because its First Memorial Fund Sign was "lawfully erected" on the East wall of the Beverly Boulevard Building in September of 2000, "the City has no right to interfere with Plaintiff's right to maintain the [Sign], including the right to change copy" and the City "cannot retroactively apply the New Sign Ordinance" to Plaintiff's pre-existing Sign. Plaintiff's Motion at 9-10. Defendants argue that the protections granted to signs by Section 5412 of the OAA do not

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[3] Although the provisions of the OAA are generally only applicable to "the placing of advertising displays within view of highways located in unincorporated areas of [California]" and "the placing of advertising displays within 660 feet from the edge of the right-of-way of, and the copy of which is visible from, interstate highways or primary highways, including the portions of such highways located in unincorporated areas," Section 5412 of the OAA applies more broadly to advertising displays "lawfully erected *anywhere* within [California]." Cal. Bus. & Prof. Code §§ 5271, 5412 (emphasis added).

apply to the Sign on the East wall of the Beverly Boulevard Building because "the only thing that the Plaintiff ever 'lawfully erected' in this case was an art mural which, by the plain language of the ordinance that allowed it, was prohibited from ever incorporating any advertising content." Defendants' Opposition at 5. Essentially, although Defendants concede that the First Memorial Fund Sign was "lawfully erected," Defendants argue that because the City found that the First Memorial Fund Sign was an "art mural" under the First Sign Ordinance, that Sign is not protected by Section 5412 because it was not an "advertising display."

However, for purposes of the application of Section 5412 of the OAA, the relevant definition of "advertising display" is not taken from the First Sign Ordinance, but from the OAA. Under OAA Section 5202, the term "'advertising display' refers to advertising structures and to signs." Cal. Bus. & Prof. Code § 5202. "Advertising structure" is defined as "a structure of any kind or character erected, used, or maintained for outdoor advertising purposes." Cal. Bus. & Prof. Code § 5203. The term "sign" is defined as "any card, cloth, paper, metal, painted or wooden sign of any character placed for outdoor advertising purposes on or to the ground or any tree, wall, bush, rock, fence, building, structure or thing, either privately or publicly owned, other than an advertising structure." Cal. Bus. & Prof. Code § 5221. Based on the fact that the Internet address for the City's Veteran's Memorial Fund was included at the bottom of the First Memorial

Fund Sign, the Court disagrees with Defendants' characterization of the First Memorial Fund Sign as an "art mural" and finds that the Sign was "placed for outdoor advertising purposes" and therefore constitutes an "advertising display" under the OAA. Indeed, the commercial nature of the First Memorial Fund Sign is best described by Defendants in their Opposition to Plaintiffs' Motion Summary Judgment: "That plaintiff's Memorial Fund sign sought to raise funds for a non-profit organization does not afford it status as a political, religious, or ideological message. The Memorial Fund sign sought a commercial transaction: raising funds for the Veteran's Memorial."[4] Defendants' Opposition at 14. Since the City explicitly found that the First Memorial Fund Sign was "exempt from the [First Sign Ordinance]" and Defendants therefore concede that the Sign was "lawfully erected"[5] under the First Sign Ordinance, Plaintiff has protectable property rights in the Sign on the

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[4] Although Defendants do not specify whether they are referring to the First or the Second Memorial Fund Sign, Defendants' analysis applies equally to both Memorial Fund Signs.

[5] Under the OAA, "'[l]awfully erected' means, in reference to advertising displays, advertising displays which were erected in compliance with state laws and local ordinances in effect at the time of their erection or which were subsequently brought into full compliance with state laws and local ordinances, except that the term does not apply to any advertising display whose use is modified after erection in a manner which causes it to become illegal." Cal. Bus. & Prof. Code § 5216.1.

East wall of the Beverly Boulevard Building pursuant to Section 5412 of the OAA.

Based on the foregoing, the Court finds that Plaintiff has protected property rights in the Sign on the East wall of the Beverly Boulevard Building under the OAA which the City cannot "take" without just compensation. Accordingly, the City's attempt to prevent Plaintiff from changing the copy on that Sign, or its attempt to otherwise enforce the New Sign Ordinance against Plaintiff, constitutes an unlawful "taking" in violation of Plaintiff's Fifth Amendment rights. Plaintiff's Motion for Summary Judgment on its Fifth Amendment Taking Claim in its First Claim for Relief for its Sign on the East wall of the Beverly Boulevard Building is **GRANTED**.

2. Plaintiff's Remaining Claims for Relief

In its First, Second and Third Claims for Relief, Plaintiff alleges that Defendants have violated its right to free speech under the First Amendment, and its right to due process and equal protection under the Fifth and Fourteenth Amendments with respect to the Sign on the East Wall of the Beverly Boulevard Building.[6] Each of the foregoing claims is predicated

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[6] In its Fourth Claim for Relief, Plaintiff seeks money damages for Defendants' alleged interference with its rights as outlined in its First, Second and Third Claims for Relief. Plaintiff's Fourth Claim for Relief fails to state an independent claim and is therefore **DISMISSED.**

upon the City's attempt to enforce its New Sign Ordinance against that Sign. In light of the Court's decision that Plaintiff's Sign on the East Wall of the Beverly Boulevard Building is protected by Section 5412 of the OAA and, as a result, the City cannot take any action to enforce the New Sign Ordinance against that Sign without first compensating Plaintiff, Plaintiff's remaining claims are moot.

Accordingly, the Court hereby **DISMISSES** Plaintiff's free speech, due process and equal protection claims as those claims apply to the Sign on the East wall of the Beverly Boulevard Building on the grounds that those claims are moot.

B. The West Wall of The Beverly Boulevard Building

1. Plaintiff's "Takings" Claim Under the Fifth Amendment

Plaintiff's "taking claim" in its First Claim for Relief is the same for the Sign on the West wall of the Beverly Boulevard Building as the Sign on the East wall of the Building – that the City's attempt to use its police powers to compel the removal of Plaintiff's Jurassic Park Sign, or to prevent Plaintiff from changing the copy on that sign, is an unconstitutional attempt to "deprive Plaintiff of protected property rights without compensation in violation of the Takings

Clause of the Fifth [Amendment]."[7] Plaintiff's Motion at 6-7. As with the First Memorial Fund Sign, Plaintiff argues that it has protected property rights in its Sign on the West wall of the Beverly Boulevard Building which are derived from Section 5412 of the OAA. Specifically, Plaintiff argues that its Jurassic Park Sign was protected as "legal non-conforming use" which was exempt from the New Sign Ordinance, because the Warhol Mural and Campbell's Soup Mural which preceded it were "lawfully erected," and Plaintiff is therefore entitled under Section 5412 of the OAA to "change copy" on that Sign without interference from the City. Defendants argue that neither the Warhol Mural nor the Campbell's Soup Mural which replaced it were protected by Section 5412 of the OAA because those murals did not constitute "advertising displays" as defined by the OAA. Defendants further argue that the Jurassic Park Sign, which replaced the Campbell's Soup Mural after the enactment of the New sign Ordinance, was not protected under Section 5412 of the OAA because it was not "lawfully erected."

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[7] Plaintiff's claim for deprivation of property without due process brought under the Fifth and Fourteenth Amendments is addressed in Section VI.B.3, *infra*.

a. Section 5412 of the OAA did not apply to the Warhol Mural and Campbell's Soup Mural because those Murals were not "advertising displays."

As set forth in the preceding section, in order to qualify for the protections of Section 5412 of the OAA, a sign must be both an "advertising display" and "lawfully erected." In this case, it is undisputed that the Warhol Mural and Campbell's Soup Mural were "lawfully erected" under the First Sign Ordinance. However, unlike the First Memorial Fund Sign which the Court found was an "advertising display" under the OAA, the Court finds that the Warhol Mural and Campbell's Soup Mural are not eligible for the protections afforded by Section 5412 because they do not constitute "advertising displays" within the meaning of the OAA.

Plaintiff concedes that the Warhol Mural and Campbell's Soup Mural did not constitute "commercial advertising," however, Plaintiff argues that "the Outdoor Advertising Act is not simply limited to commercial advertising displays" and claims that the OAA also applies to noncommercial signs and murals that do not contain any commercial advertising content. *See* Plaintiff's Motion at 7. In support of its argument, Plaintiff cites to the definition of "advertising" supplied by the California Supreme Court in *Metromedia, Inc v. City of San Diego* (II), 32 Cal. 3d 180, 188 (1982) (on remand from 453 U.S. 490 (1981)): "[a]lthough the term 'advertising' may imply

a commercial message, it is not, in ordinary usage, limited to such message. 'Advertising' is simply 'the action of calling something . . . to the attention of the public.' (Webster's New Internat. Dict. (3d ed. 1961) p. 31). We speak of 'political advertising,' and even of 'personal advertising.' Thus, in common usage a billboard bearing a political or even a personal message would be considered an 'advertising display sign.'" *Metromedia* (II), 32 Cal. 3d at 188.[8] Notwithstanding the California Supreme Court's definition of advertising in the *Metromedia* (II) case, the Court finds that the Warhol Mural and Campbell's Soup Mural were not "placed for outdoor advertising purposes" and therefore were not "advertising displays" as that term is defined by the OAA.

In 1996, the California Attorney General faced a similar issue when asked "to determine whether the [OAA] applies to the posting of a sign on private property . . . that expresses the property owner's opinion concerning a state or federal public official." 79 Op. Atty. Gen. 117, 1996 WL 344497, at *2 (Cal. A.G. June 20, 1996). At the outset of the opinion, the Attorney General set forth the relevant principles of statutory construction that would guide his analysis and noted that "[a] statute should be construed whenever possible so as to preserve its constitutionality." *Id.*

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[8] The Court notes that the California Supreme Court in *Metromedia* (II) was defining the word "advertising" for the purpose of interpreting a local San Diego ordinance, not the OAA.

In considering the stated purposes of the O-AA as expressed in Section 5226, the Attorney General concluded that "the Act is concerned with commercial advertising and not with the expression of a property owner's political philosophy." *Id.* at *3. The Attorney General went on to state that "[i]n this context then, we believe that the term 'advertise' may be defined as 'to call public attention to [especially] by emphasizing desirable qualities so as to arouse a desire to buy or patronize ([advertise] a breakfast food) (spent a fortune advertising their filter-tip cigarettes).'" *Id.* (citing Webster's Third New Internat. Dict. (1971) p. 31). Based on the foregoing definition, the Attorney General concluded that the definition of "advertising" "would exclude the expression of a political belief by a property owner whether displayed by signs or otherwise." *Id.*

The Attorney General noted that this construction of the OAA was not only consistent with the decision of the California Court of Appeals in *Desert Outdoor Advertising* that the OAA "deals with an area of purely economic regulation," it was also "consistent with the Legislature's placement of the Act in the Business and Professions Code rather than, for example, the Civil Code or the Streets and Highways Code." *Id.* (citing *People ex rel. Dept of Transportation v. Desert Outdoor Advertising, Inc.*, 68 Cal. App. 3d 440, 450 (1977)). The Attorney General further analyzed this constriction of the OAA under *Metromedia* and its progeny and determined that the inclusion of non-commercial signs within the definition

of "advertising display" would result in some instances in the treatment of non-commercial signs in a "worse manner" than certain commercial signs, "resulting in a peculiar inversion of First Amendment values" *Id.* (citing *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 512-14 (1981)).

This Court agrees with the Attorney General's interpretation of the OAA and finds that the Warhol Mural and Campbell's Soup Mural did not constitute "advertising displays" as defined by the OAA. Accordingly, the Court finds that neither the Warhol Mural nor the Campbell's Soup Mural qualified for the protections outlined in Section 5412 of the OAA.

b. The Jurassic Park Sign

Since neither the Warhol Mural nor the Campbell's Soup Mural qualified for the protections afforded by Section 5412 of the OAA, Plaintiff cannot rely on Section 5412 to provide "grandfathered" protection for the Jurassic Park Sign which replaced them. As a result, the applicability of Section 5412 of the OAA to the Jurassic Park Sign must be evaluated without regard to the Murals which preceded that Sign.

Neither party disputes that the Jurassic Park Sign, which was erected on June 1, 2001 on the West wall of the Beverly Boulevard Building, constitutes an "advertising display" under the OAA. However, Defendants argue that Section 5412 does not apply to the Jurassic Park Sign because that Sign was not

"lawfully erected." Since the Jurassic Park Sign was erected after the City enacted its New Sign Ordinance which made "tall walls" that were not located on Sunset Boulevard illegal, the Court agrees with Defendants that the Jurassic Park Sign was not "lawfully erected" and therefore would not be protected under Section 5412 of the OAA.

Plaintiff argues that even if the Jurassic Park Sign was not protected under Section 5412 the OAA, Plaintiff still has a recognized property right in placing a Sign on the West wall of its Beverly Boulevard Building "that may not be taken without due process and just compensation" under *Traverso v. People ex rel. Dept. of Transportation*, 6 Cal. 4th 1152 (1993). Plaintiff's Motion at 7. The Supreme Court has held that "a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose, or perhaps if it has an unduly harsh impact upon the owner's use of the property." *Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 127 (1978) (internal citations omitted). However, the Supreme Court has also "recognized, in a number of settings; that States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city." *Id.* at 129.

As discussed in the following sections, the City's objective of preserving the aesthetic character of West Hollywood is a substantial government goal and restricting the location of "tall walls" to Sunset

Boulevard is an appropriate means of securing that objective. The fact that enforcement of the New Sign Ordinance against Plaintiff will result in Plaintiff's inability to exploit a "property interest" it may have in renting the West wall of its Beverly Boulevard Building for advertising is not enough to establish a "taking." "'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, [the Court] focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole." *Id.* at 130-31. Indeed, where a land use regulation is reasonable [sic] related to the promotion of the general welfare of the City, the Supreme Court has uniformly rejected "the proposition that diminution in property value, standing alone, can establish a 'taking.'" *Id.* at 131; *see also Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987).

Based on the Courts finding that the Jurassic Park Sign on the West wall of Plaintiff's Beverly Boulevard Building is not protected by the OAA because it was not "lawfully erected," and the finding that the City's enforcement of its New Sign Ordinance against Plaintiff does not constitute a "taking," Defendants' Motion for Summary Judgment on Plaintiff's Fifth Amendment "Taking Claim" is GRANTED as to the Sign on the West wall of the Beverly Boulevard Building.

2. Plaintiff's First Amendment Claim

In its Second Claim for Relief, Plaintiff claims that the provisions of the City's New Sign Ordinance which make the erection of "tall walls" not located on Sunset Boulevard "illegal" constitute a "facially" unconstitutional content-based restriction on speech in violation of the First Amendment.[9] Although the parties spend an enormous amount of time in their briefs debating the constitutionality of an ordinance that distinguishes between commercial and non-commercial speech, Defendants contend, and upon review of the New Sign Ordinance the Court finds that the provisions of the New Sign Ordinance which regulate "tall walls" do not distinguish between commercial and non-commercial speech. *See* New Sign Ordinance at *passim*; Defendants' Opposition at 11 ("Tall Wall signs are only permitted on Sunset Boulevard and therefore prohibited on Beverly Boulevard, regardless of their content"); Plaintiff claims that to the extent the City's restriction against

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[9] Plaintiff's First Claim for Relief also contains a claim for violation of Plaintiff's right to free speech under the First Amendment by requiring Plaintiff to obtain a new permit each time it desires to change the message on the Sign on the West wall of its Beverly Boulevard Building. In light of the court's finding that the New Sign Ordinance which prohibits the "tall wall" on the West wall of Plaintiff's Building is constitutional (*see* discussion *infra*), and the City can therefore compel the removal of Plaintiff's Sign, Plaintiff's claim with respect to its right to change copy on that Sign is moot. Accordingly, Defendants' Motion for Summary Judgment on that claim is **GRANTED**.

"off-site tall walls" is "content-neutral," then the New Sign Ordinance is "clearly unconstitutional under *Metromedia*," because "the City's [New] Sign Ordinance prohibits off-site non-commercial signs, but freely allows on-site commercial signs. Thus, the City prefers commercial over non-commercial speech in violation of the first basis of the *Metromedia* decision." Plaintiff's Reply at 11-12.

Plaintiff's argument is flawed in that the focus of this case is not on a city's restriction of *all* off-site signs like the case before the Supreme Court in *Metromedia*, but rather the City of West Hollywood's restrictions with respect to a certain type of sign – a "tall wall." There is nothing in the City's New Sign Ordinance to suggest that on-site "tall walls" are "freely allowed." To the contrary, the City's New Sign Ordinance has very carefully outlined restrictions with respect to the size, shape and placement of on-site signs in the City of West Hollywood. A review of the New Sign Ordinance demonstrates that signs over 5000 square feet in size, or "tall walls," are prohibited whether they are "off-site" or "on-site." As a result, the City's New Sign Ordinance does not prefer "on-site" commercial speech over "off-site" non-commercial speech as suggested by Plaintiff.

Since the City's New Sign Ordinance burdens both commercial and non-commercial speech, the Court must analyze the effect of the New Sign Ordinance on each type of speech. *See Outdoor Systems, Inc. v. City of Mesa*, 997 F.2d 604, 610 (9th Cir. 1993). The Supreme Court has adopted a four part test for

determining the validity of government restrictions on commercial speech: "(1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial government interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective." *Metromedia*, 453 U.S. at 507 (citing *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 563-66 (1980)).

The commercial speech at issue here, an advertisement for the movie Jurassic Park III does not involve unlawful activity and is not misleading. The City's stated purpose for restricting "tall walls" to Sunset Boulevard is to protect the unique character of the "Sunset Strip" and to preserve the residential character of the rest of the City of West Hollywood. *See* Amended Declaration of Susan Healy Keene at *passim*. The Supreme Court has repeatedly held that a City's interest in aesthetics constitutes a substantial government interest *See, e.g., City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984) ("it is well settled that the state may legitimately exercise its police powers to advance esthetic values."). Reaffirming the conclusion of the majority in *Metromedia*, the Supreme Court in *Taxpayers for Vincent* found that, the "City's aesthetic interests were sufficiently substantial to provide an acceptable justification for a content-neutral prohibition against the use of billboards." *Id.* Indeed, "the city's interest

in attempting to preserve [or improve] the quality of urban life is one that must be accorded high respect." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976).[10]

By restricting "tall walls" to Sunset Boulevard, the City's New Sign Ordinance satisfies the third element of the *Central Hudson* test because it directly advances the City's stated interest. The last element of the *Central Hudson* test requires "a reasonable fit between the ends and the means, a fit 'that employs not necessarily the least restrictive means, but . . . a means narrowly tailored to achieve the desired objective.'" *Outdoor Systems*, 997 F.2d at 610 (quoting *Board of Trustees of State University v. Fox*, 492 U.S. 469, 480 (1989)). The Court finds that there is a reasonable fit between the City's New Sign Ordinance and the interests that the City seeks to achieve, as the New Sign Ordinance goes "no further than necessary" in seeking to accomplish the City's stated goals. Accordingly, the Court finds that the restrictions placed on commercial speech by the City's New Sign Ordinance pass the *Central Hudson* test.

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[10] In light of the Court's finding that the City's interest in preserving the aesthetic quality of its residential areas outside of the "Sunset Strip" is sufficient to support the city's exercise of its police powers and the constitutionality of its New Sign Ordinance, Plaintiff's Counsel's request for further discovery pursuant to Federal Rule of Civil Procedure 56(f) on the companion issue of traffic safety which the Court need not address is **DENIED as moot**.

"The constitutional gauge for restrictions on noncommercial speech is the time, place, or manner test; the government may impose reasonable time, place, or manner restrictions that incidentally burden speech if they are (1) content neutral, (2) narrowly tailored to serve a significant governmental interest, and (3) leave open 'ample alternative channels for communication of the information'" *Outdoor Systems*, 997 F.2d at 612. As discussed above, the provisions of the City's New Sign Ordinance which restrict "tall walls" to Sunset Boulevard are content neutral, as all "tall walls" are prohibited off the "Sunset Strip" without regard to whether they contain commercial or non-commercial speech.[11] In the context of applying the *Central Hudson* test to the City's New Sign Ordinance, the Court has already found that the City's restriction of "tall walls" to Sunset Boulevard is narrowly tailored to serve a significant governmental interest and that the New Sign Ordinance curtails no more speech than is necessary to accomplish its purpose. The Court further finds that the New Sign Ordinance leaves open "ample alternative channels for communication of the information."

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[11] Under the City's New Sign Ordinance, "murals" (a term which is not defined by the Ordinance) of any size are "restricted" unless they are "tall wall signs in compliance with Section 19.34.070.1," or are "approved by the Fine Arts Commission." Since Plaintiff has not directly challenged the portion of the New Sign Ordinance relating to "murals," the Court will not address the constitutionality of that provision of the New Sign Ordinance.

Accordingly, the Court finds that the provisions of the City's New Sign Ordinance which restrict "tall walls" to Sunset Boulevard are constitutional on their face and do not violate Plaintiff's First Amendment rights to free speech. Defendants' Motion for Summary Judgment on Plaintiff's "facial" First Amendment Claim as that claim applies to the Sign on the West wall of Plaintiff's Building is **GRANTED**.

Plaintiffs Second Claim for Relief also contains a claim that the City's alleged "selective enforcement" of the New Sign Ordinance is unconstitutional "as applied" to Plaintiff under the First Amendment.[12] Specifically, Plaintiff claims that the City is attempting to improperly regulate the content of the messages appearing on Plaintiff's signs by treating commercial/advertising messages and artistic/non-commercial messages differently. In support of its argument, Plaintiff cites to the fact that the City allowed the Warhol Mural, Campbell's Mural and First Memorial Fund Sign (characterized by Plaintiff as (artistic/non-commercial) to remain on Plaintiff's building, but issued citations for the Jurassic Park Sign and Second Memorial Fund Sign (characterized by Plaintiff as commercial/advertising).

However, as explained in the foregoing sections, the City's First Sign Ordinance did not restrict "murals," and

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[12] Plaintiff's selective enforcement claim arising out of Plaintiff's equal protection rights under the Fifth and Fourteenth Amendments is addressed in Section IV(B)(3), *infra*.

therefore despite having received complaints about Plaintiff's Warhol Mural and First Memorial Fund Sign after they were erected in September of 2000, the City found that they were "murals" and exempt from the First Sign Ordinance. In June of 2001, after the City had enacted its New Sign Ordinance which, as explained above, prohibits all tall walls regardless of content, the City received a second complaint regarding the signs on Plaintiff's Beverly Boulevard Building. The City investigated the complaint, and found that Plaintiff had changed the Warhol Mural and First Memorial Fund Sign (which, had they remained as is, would have been legal, non-conforming signs under the New Sign Ordinance) to the Jurassic Park Sign and Second Memorial Fund Sign. The City found that both Signs were illegal "tall walls" in violation of the New Sign Ordinance and issued citations to Plaintiff for both Signs. Accordingly, Plaintiff's [sic] has failed to demonstrate that the City has applied the New Sign Ordinance to Plaintiff in a manner which differentiates between types of speech based on content.

Plaintiff also argues that the City's decision to issue a citation which carried a fine of $1000 for the Jurassic Park Sign, while only issuing a warning with no fine for the Second Memorial Fund Sign, is evidence that the City is using its New Sign Ordinance to regulate speech based on content. However, as the City sets forth in its Supplemental Brief on Plaintiff's as-applied First Amendment Claim, the City's citations demonstrate that the City considered

both the Second Memorial Fund Sign and the Jurassic Park Sign "illegal" under the New Sign Ordinance. Despite this fact, Plaintiff draws the unsubstantiated conclusion that the City's decision to issue a warning for the Second Memorial Fund Sign rather than an order to pay was evidence that the City was "willing to allow the [Second] Memorial Fund mural to remain." Plaintiff's Further Supplemental Brief at 4. To the contrary, it is clear from the citation issued to Plaintiff for the Second Memorial Fund Sign that Plaintiffs failure to remove the Sign would result in a $1000 fine. *See* Plaintiff's Exhibit 9 at 90. Indeed, during the administrative hearing in November of 2001, Tom Benedetti, the Code Enforcement Officer who issued the citations to Plaintiff, testified that he issued the warning to the Second Memorial Fund Sign not because of the content, but because it was the first violation he saw when he went to investigate the complaint. Mr. Benedetti further testified that he issued the order to pay citation for the Jurassic Park Sign because he considered that to be Plaintiffs "second" violation. Plaintiff's [sic] does not offer any evidence to rebut Mr. Benedetti's testimony, and simply fails to provide the Court with anything more than pure speculation that the City's treatment of the Signs was a content-based application of the New Sign Ordinance to Plaintiff.

Accordingly, the Court finds that the New Sign Ordinance is constitutional as-applied to Plaintiff and Defendants' Motion for Summary Judgment on Plaintiff's "as-applied" First Amendment Claim as

that claim applies to the Sign on the West wall of Plaintiff's Beverly Boulevard Building is GRANTED.

3. Plaintiff's Due Process and Equal Protection Claims

In its Opposition to Defendants' Motion, Plaintiff claims that its "Second Claim for Relief states a claim for deprivation of procedural due process based on the assertion that, by attempting to prevent Plaintiff from changing copy on these lawfully erected mural signs, Defendants are attempting to deprive Plaintiff of its right to property without due process."[13] Plaintiff's Opposition at 18. To prevail on a procedural due process claim, Plaintiff must demonstrate that: (1) a protected property interest was taken; and (2) that the procedural safeguards surrounding the deprivation were inadequate. *See Sierra Lake Reserve v. City of Rockland*, 938 F.2d 951, 956 (9th Cir. 1991). Plaintiff alleges that its claim is supported by the decision of the California Supreme Court in *Traverso*. *Traverso*, 6 Cal. 4th at 1160.

In *Traverso*, the California Department of Transportation posted a notice on the plaintiff's billboard, citing the plaintiff for failing to obtain a permit for his billboard as was required by the OAA. *Id.* at 1158. The plaintiff responded to the notice by claiming that

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[13] The Court believes that this statement more accurately reflects one of the claims set forth in Plaintiff's First Claim for Relief than its Second Claim for Relief.

he did not need a permit for the billboard and did not request an administrative review of the citation. *Id.* The California Department of Transportation began to remove the billboard, and the plaintiff filed suit claiming, *inter alia*, that the OAA violated his procedural due process rights. *Id.* The court found that the billboard was a protectable property interest because of its value as an advertising medium and its pecuniary worth as a structure. *Id.* at 1160. However, the court in *Traverso* held that there was no procedural due process violation under the Fourteenth Amendment because the OAA provided the plaintiff with notice and an implied right to a hearing prior to revoking his billboard permit. *Id.* at 1167. The court specifically noted that the plaintiff's "failure to request a hearing after receiving notice that Caltrans intended to remove [his] billboard is fatal to [his] constitutional challenge." *Id.*

Despite the earlier finding of the Court, even assuming that under *Traverso* Plaintiff has a protectable property interest in placing a sign on the West wall of the Beverly Boulevard Building, Plaintiff, like the billboard owner in *Traverso,* received all the process it was due. Plaintiff filed a Request for Administrative Hearing on June 25, 2001 and in a letter attached to that request, Plaintiff stated that it "has elected to litigate its constitutional claims in federal court? On November 29, 2001, Plaintiff had a hearing before a hearing officer. Once the hearing officer issued his decision which was unfavorable to Plaintiff, Plaintiff had the opportunity to appeal the hearing officer's

decision to the Beverly Hills Municipal Court. There is no evidence in the record that Plaintiff ever attempted to appeal its claim to the Municipal Court. Plaintiff's failure to appeal the decision notwithstanding, Plaintiff received adequate due process with the administrative hearing and there is no procedural due process violation. *See, e.g., Traverso*, 6 Cal. 4th at 1160.

In its Opposition to Defendants' Motion, Plaintiff characterizes the equal protection claims in its Second and Third Claims for Relief as: (1) the City's unconstitutional attempt to deprive Plaintiff of the right to change copy on lawfully-erected signs, which is a right granted to other outdoor advertising companies with lawfully-erected off-site signs in the City; and (2) the City's unconstitutional attempt to deprive "Plaintiff's building of the right to tall walls, which is a right given to virtually every other building of similar size in the city." Plaintiff's Opposition at 19. In light of the Court's decision in Section IV(B)(1), *supra*, that Plaintiff's Jurassic Park sign on the West wall of its Beverly Boulevard Building was not "lawfully erected," the first of the two equal protection claims articulated by Plaintiff in its Opposition fails.

The Court finds that the second of Plaintiff's two equal protection claims also fails as a matter of law. The equal protection clause "is essentially a direction that all persons similarly situated be treated alike." *Cleburn v. Cleburn Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). If legislation classifies people in such a way that they receive different treatment under the law,

the degree of scrutiny the court applies to the legislation depends on the basis for the classification. Where a fundamental right or a suspect class is involved, the court reviews the classification with strict scrutiny. If the ordinance does not infringe upon a fundamental right or target a protected class, the rational basis test applies: the ordinance must be rationally related to the achievement of a legitimate government purpose. *See N.A.A.C.P., Los Angeles Branch v. Jones*, 131 F. 3d 1321 (9th Cir 1997).

In this case, Plaintiff is not a member of a suspect class and the City's New Sign Ordinance does not classify persons or buildings based on any suspect categorization. Additionally, Plaintiff is not exercising a fundamental right. Plaintiff is not attempting to assert a right to engage in a specific type of speech, rather, Plaintiff is attempting to assert its right to sell advertising space on the side of its Beverly Boulevard Building. There is no fundamental right to erect signs on, the side of a building. Accordingly, the City's New Sign Ordinance is properly analyzed under the rational basis test applicable to economic regulation. *See, e.g., Lamar Advertising Co. v. City of Douglasville, Georgia*, 254 F. Supp. 2d 1321 (N.D. Ga. 2003).

Where, as here, the Court has found that the New Sign Ordinance is constitutional under the First Amendment, the Court need not engage in an independent Equal Protection analysis. As the Supreme Court has found that "[i]f there is a sufficient 'fit' between the legislature's means and ends to satisfy

the concerns of the First Amendment, the same 'fit' is surely adequate under the applicable 'rational basis' equal protection analysis." *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico,* 478 U.S. 328, 344 n.9 (1986).

Finally, Plaintiff's Second Claim for Relief challenges the City's selective enforcement of the New Sign Ordinance. Specifically, Plaintiff alleges that because the City issued Plaintiff a citation which carried a fine of $1000 for the violation of Section 19.34.080(1) of the New Sign Ordinance with the Jurassic Park Sign, but only issued a citation with a warning for the Second Memorial Fund Sign under the same section, the City enforced the New Sign Ordinance in an "arbitrary, selective and discriminatory fashion based on the content of the message." Complaint at ¶ 16. Plaintiff claims that this inconsistent treatment of the two signs on the opposing sides of its Beverly Boulevard Building constitutes a violation of Plaintiff's constitutional rights under the equal protection clause.

Plaintiff is correct that a statute or ordinance which is valid on its face may violate the equal protection clause if it is applied in a discriminatory manner. *See Yick Wo v. Hopkins*, 118 U.S. 356 (1886). However, "[a]s long as a law or regulation is rationally based, the mere failure of those who administer it to treat all persons who have violated it with complete equality does not of itself infringe the constitutional principle of equal protection. The equal protection clause prohibits selective enforcement

which is 'deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification.'" *D'Acquisto v. Washington*, 640 F. Supp. 594, 625 (ND. Ill. 1966) (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962)). In this case, Plaintiff has not alleged that it was treated differently than other "persons" with respect to the enforcement of the New Sign Ordinance, rather, Plaintiff alleges only that its two Signs were not treated equally. Since Plaintiff has failed to set forth any evidence that it was treated differently than other, similarly-situated persons, Plaintiff's selective enforcement equal protection claim fails as well.

For all of the foregoing reasons, Defendants' Motion for Summary Judgment on Plaintiff's due process and equal protection claims as those claims apply to the Sign on the West wall of Plaintiff's Beverly Boulevard Building is **GRANTED**.

V. CONCLUSION

For all of the foregoing reasons, Plaintiff's Motion for Partial Summary Judgment or Specification of issues Without Substantial Controversy is **GRANTED in part** as to its Fifth Amendment "Takings Claim" for its Sign on the East wall of its Beverly Boulevard Building. The balance of Plaintiff's Motion is **DENIED**. Defendants' Motion for Summary Judgment or in the Alternative for Summary Adjudication of Issues is **GRANTED in part** as to Plaintiff's First, Second, Third and Fourth Claims

for Relief as those claims apply to Plaintiff's Sign on the West wall of its Beverly Boulevard Building. The balance of Defendants' Motion is **DENIED**. The Court, on its own Motion, **DISMISSES with prejudice** Plaintiff's First, Fifth and Fourteenth Amendment free speech, due process and equal protection claims as those claims apply to the Sign on the East wall of the Beverly Boulevard Building on the grounds that those claims are moot. The Court also **DISMISSES** with prejudice Plaintiff's Fourth Claim for Relief for its Sign on the East wall of its Beverly Boulevard Building for failure to state a claim upon which relief can be granted.

The parties shall meet and confer and shall prepare a joint proposed Judgment and Order for Permanent Injunction consistent with this Order on or before April 25, 2005. The parties shall lodge their proposed Judgment and Order for Permanent (Injunction no later than April 27, 2005. In the event that the parties cannot agree on a proposed Judgment and Order for Permanent injunction, the parties shall each lodge their proposed version of the Judgment and Order for Permanent Injunction no later than April 27, 2005. The parties shall also file a joint report by April 27, 2005 which sets forth their respective positions with respect to the provisions to which they cannot agree.

IT IS SO ORDERED.

The Clerk shall serve a copy of this Minute Order on all parties to this action.

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BEVERLY BOULEVARD LLC, a California limited liability company, Plaintiff-Appellee, v. CITY OF WEST HOLLYWOOD, California municipal corporation; WEST HOLLYWOOD COMMUNITY REDEVELOPMENT COMMISSION; a political subdivision of the City of West Hollywood; Defendants-Appellants.	No. 05-55961 D.C. No. CV-01-05630-JFW Central District of California, Los Angeles ORDER (Filed Jul. 20, 2007)
BEVERLY BOULEVARD LLC, a California limited liability company, Plaintiff-Appellant, v. CITY OF WEST HOLLYWOOD, California municipal corporation; WEST HOLLYWOOD COMMUNITY REDEVELOPMENT COMMISSION; a	No. 05-55970 D.C. No. CV-01-05630-JFW Central District of California, Los Angeles

political subdivision of the City of West Hollywood, Defendants-Appellees.	
BEVERLY BOULEVARD LLC, a California limited liability company, Plaintiff-Appellant, v. CITY OF WEST HOLLYWOOD, California municipal corporation; WEST HOLLYWOOD COMMUNITY REDEVELOPMENT COMMISSION; a political subdivision of the City of West Hollywood, Defendants-Appellants.	No. 05-56384 D.C. No. CV-01-05630-JFW Central District of California, Los Angeles

Before: FISHER and CLIFTON, Circuit Judges, and FOGEL,[1] District Judge.*

The panel has voted to deny the petition for panel rehearing. Judges Fisher and Clifton have voted to deny the petition for rehearing en banc, and Judge Fogel recommended denying the petition for rehearing en banc.

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[1]* The Honorable Jeremy D. Fogel, United States District Judge for the Northern District of California, sitting by designation.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehearing [sic] the matter en banc. Fed. R. App. P. 35.

Appellee's petition for panel rehearing and rehearing en banc, filed June 19, 2007, is **DENIED**.

APPENDIX E

City of West Hollywood Municipal Code, Title 19 (Zoning Ordinance)

FORMER ORDINANCE § 19.76.020(a)(8):

"Sign" shall mean any object, device, display or structure, or part thereof, situated outdoors or indoors, which is used to identify, display, or direct or attract attention to an object, person, institution, organization, business, product, service, event or location by any means, including words, letters, figures, design, symbols, fixtures, colors, illumination or projected image. A structure and/or the content of a structure may be a sign.

FORMER ORDINANCE § 19.76.080(e) [Prohibited Signs]:

The following signs are inconsistent with the standards set forth in this chapter, and therefore are prohibited:

e. *Off-Site Signs.* A sign which advertises goods, services or business establishments that are not available within the property lines of the property on which the sign is located, except for billboards and creative billboards on Sunset Boulevard as defined in subsections (a) and (c)(14) of Section 19.76.020.

FORMER ORDINANCE § 19.76.090(b) [Artwork Excluded from Sign Definition]:

b. Murals which do not incorporate letter [sic] intended to advertise.

ORDINANCE § 19.34.080(I)(1) [Off-Site Signs]:

Permit Requirement. Conditional Use Permit approval shall be required for use of any wall proposed to be used for tall wall signs including those that have been used for tall wall signs prior to May 2, 2001. Once a Conditional Use Permit has been granted, the tall wall image may be changed subject to a Zone Clearance.

ORDINANCE § 19.34.090(A)(4) [Prohibited and Restricted Signs]:

A. *Prohibited Signs.* The following signs are inconsistent with the purposes and standards of this chapter and are prohibited in all zoning districts:

4. Off-site signs not specifically allowed by the provisions of Section 19.34.080 (Off-Site Signs);

ORDINANCE § 19.90.020 [Definitions of Specialized Terms and Phrases]

Sign. An object, device, display, or structure, or any part thereof, situated outdoors or indoors, which is used to identify, display, or direct or attract attention to an object, person, institution, organization, business, product, service, event or location by any means, including words, letters, figures, design symbols, fixtures, colors, illumination, or projected image. The following are definitions related to signs.

61. *Wall Sign.* A sign that is attached to or painted on the exterior wall of a structure with the

display surface of the sign approximately parallel to the building wall.

APPENDIX F

EXHIBIT
2-A

WEST WALL-
INSTALLED 6/1/2001

EXHIBIT
8

EAST MURAL-
INSTALLED 12/28/2000

EXHIBIT 5

87

(2)

No. 07-742

FILED
MAR 3 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

BEVERLY BOULEVARD, LLC,

Petitioner,

v.

CITY OF WEST HOLLYWOOD and
WEST HOLLYWOOD COMMUNITY
DEVELOPMENT DEPARTMENT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals correctly held that a property owner who unlawfully erected tall wall signs had no protectable property right under California's Outdoor Advertising Act (California Business & Professions Code § 5200, *et seq.*)

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OPINIONS BELOW

In a unanimous, unpublished memorandum disposition, filed June 5, 2007, the Ninth Circuit affirmed in part, reversed and vacated in part, and dismissed in part the decision of the District Court on cross-motions for summary judgment. The decisions of the Court of Appeals (Petitioner's App. 1-7) and the District Court (Petitioner's App. 15-55) are reproduced in the appendices to the Petition.

STATUTORY PROVISIONS INVOLVED

California Outdoor Advertising Act, Business & Professions Code § 5412:

> Notwithstanding any other provision of this chapter, no advertising display which was lawfully erected anywhere within this state shall be compelled to be removed, nor shall its customary maintenance or use be limited, whether or not the removal or limitation is pursuant to or because of this chapter or any other law, ordinance, or regulation of any governmental entity, without payment of compensation, as defined in the Eminent Domain Law (Title 7 (commencing with Section 1230.010) of Part 3 of the Code of Civil Procedure), except as provided in Sections 5412.1, 5412.2, and 5412.3. The compensation shall be paid to the owner or owners of the advertising display and the owner or owners of the land upon which the display is located.

This section applies to all displays which were lawfully erected in compliance with state laws and local ordinances in effect when the displays were erected if the displays were in existence on November 6, 1978, or lawfully erected after November 6, 1978, regardless of whether the displays have become nonconforming or have been provided an amortization period. This section does not apply to on-premise displays as specified in Section 5272 or to displays which are relocated by mutual agreement between the display owner and the local entity.

"Relocation," as used in this section, includes removal of a display and construction of a new display to substitute for the display removed.

It is a policy of this state to encourage local entities and display owners to enter into relocation agreements which allow local entities to continue development in a planned manner without expenditure of public funds while allowing the continued maintenance of private investment and a medium of public communication. Cities, counties, cities and counties, and all other local entities are specifically empowered to enter into relocation agreements on whatever terms are agreeable to the display owner and the city, county, city and county, or other local entity, and to adopt ordinances or resolutions providing for relocation of displays.

California Outdoor Advertising Act, Business & Professions Code § 5216.1

> "Lawfully erected" means, in reference to advertising displays, advertising displays which were erected in compliance with state laws and local ordinances in effect at the time of their erection or which were subsequently brought into full compliance with state laws and local ordinances, except that the term does not apply to any advertising display whose use is modified after erection in a manner which causes it to become illegal. There shall be a rebuttable presumption pursuant to Section 606 of the Evidence Code that an advertising display is lawfully erected if it has been in existence for a period of five years or longer without the owner having received written notice during that period from a governmental entity stating that the display was not lawfully erected.

West Hollywood Municipal Code Section 19.34.010 Purpose.

> This chapter provides standards for on-site and off-site signs to safeguard life, health, property, safety, and public welfare, while encouraging creativity, variety and compatibility, and enhancement of the city's image. The provisions of this chapter are intended to:
>
> A. Encourage creative and well-designed signs that contribute in a positive way to the city's visual environment, express local character, and help develop a distinctive image for the city.

B. Encourage signs that are responsive to the aesthetics and character of their particular location, adjacent buildings and uses, and the surrounding neighborhood. Signs should be compatible and integrated with the building's architectural design and with other signs on the property.

C. Recognize that signs are a necessary form of communication, and provide flexibility within the sign review and approval process to allow for unique circumstances and creativity.

STATEMENT OF CASE

The City of West Hollywood consists of not quite two square miles of fully developed area in Los Angeles County. West Hollywood is primarily residential but enjoys a few distinct commercial areas, including the intensely urban Sunset Strip and a quaint and hip part of town along Melrose Avenue and Beverly Boulevard dominated by smaller shops, many associated with the design industry.

Petitioner owns an 8-story building on Beverly Boulevard in West Hollywood and, as can be seen from the photos in Petitioner's Appendix F (App. 63-65), the building is otherwise surrounded by two story structures dressed with awnings on a street lined with trees.

Sunset Boulevard is designed and developed to be vibrant and commercial. Advertising displays on Sunset Strip are plentiful and many are innovative, award-

winning and competitive. The boulevard is marked by nightclubs and restaurants. It is not uncommon to find bumper to bumper traffic along Sunset Strip at 2:00 in the morning, even on a weeknight.

The City allows "tall wall" signs along the Sunset Strip. A "tall wall" sign is a large off-site advertising sign affixed to the side of a building.

The City's sign regulations have been adopted for the purpose of promoting traffic safety and aesthetic considerations. WHMC §19.34.010. The City submitted extensive evidence in the trial court to support both justifications.

In late 2000, Plaintiff erected two multi-story murals on either side of a building located at 8899 Beverly Boulevard. When they first appeared, the City received citizen complaints. A City Code Compliance Officer inspected the images on the sides of the building to determine whether the images were in violation of any provision of the City's zoning ordinance. One mural consisted of a multi-colored abstract image, the apparent replication of Andy Warhol's Marilyn Monroe portrait, a self portrait and in the lower left-hand corner an image depicting the top of what appears to be a replication of Andy Warhol's Campbell's Soup Can. On the other mural was an image of the Statue of Liberty in the foreground with the Declaration of Independence in the background and the Iwo Jima War Memorial depicted above the Statue of Liberty's Crown. Each of the two images covered the majority of the sides of the building.

Up until that time, the City had not anticipated that a property owner would erect an 8-story art mural; so, not surprisingly, the City did not have any regulations in place with respect to such. The City did regulate "tall walls." By letter dated December 11, 2000 then-Planning Division Manager Lisa Heep informed the owners of the building located at 8899 Beverly Boulevard that neither of the murals constituted a violation of local law.

The letter states, in pertinent part, as follows:

> "[a]s it appears that neither of these murals include any form of advertising, such artwork is currently exempt from the sign code. However, I wanted to bring to your attention that should these murals be replaced with any form of advertising signage, this would be in violation of the Code and a citation would be issued."

Thereafter, each of the two murals located on the sides of the building at 8899 Beverly Boulevard was replaced with an advertising sign. One of the signs was an advertisement for the film "Jurassic Park III." That sign included an approximately five story tall image of the film's logo set against a gray background. The sign covered the entire side of the west-facing building. On the other side of the building was draped advertisement for the West Hollywood Veterans Memorial Fund. That sign included the words "West Hollywood Veterans Memorial Fund" above an image of the Statue of Liberty set against a white circle. A series of flags or banners was depicted on the sign below the image of the Statue of Liberty.

On June 11, 2001, the City determined that the two advertising signs violated the zoning ordinance relating to "tall walls" and the property owner was cited.

Since June of 2001, the advertising signs at 8899 Beverly Boulevard have been replaced on a regular and periodic basis with new signs advertising an array of different commercial enterprises.

Petitioner claimed that it had a "protectable property interest" in the signs under the California Outdoor Advertising Act (California Business & Professions Code §5200 et seq.) and that it had a first amendment right to erect these signs where it had previously displayed art murals. After the City cited Petitioner for its illegal off-site tall wall signs, Petitioner filed the instant lawsuit.

The Outdoor Advertising Act ("California OAA") affords billboard owners in California the right to change copy on lawfully erected advertising displays. California Bus. & Prof. Code § 5412; Petitioner's App. 4, App. 28-29. To qualify for the protections outlined in Section 5412, a sign must *both* constitute an "advertising display" as defined by the OAA, *and* have been "lawfully erected" as defined by the OAA. Petitioner's App. 4; App.; App 28-29.

"Lawfully erected" is a term of art defined by the California OAA, in pertinent part, as "advertising displays which were erected in compliance with state laws and local ordinances in effect at the time of their erection." Bus. & Prof. Code § 5216.1; Petitioner's App. 31 fn 5. An advertising display that was not erected in compliance with local ordinances is not protected by the OAA.

The California OAA further provides that "'[a]dvertising display' refers to advertising structures and signs." Bus. & Prof. Code § 5202; Petitioner's App. 30. "Advertising structures" and "signs" are defined by the Act as structures or signs of any character "placed for outdoor advertising purposes." *See* Bus. & Prof. Code §§ 5203, 5221; Petitioner's App. 30.

The District Court's April 18, 2005 ruling addressed the two walls and reached two different results. The District Court found that the ordinance had not violated Petitioner's first amendment rights and concluded that the off-site commercial advertising on the west wall is illegal. However, the District Court distinguished the east wall and found that "plaintiff has protected property rights in the Sign on the East wall of the Beverly Boulevard Building under the OAA [state Outdoor Advertising Act] which the City cannot 'take' without just compensation." Petitioner's App. 32.

The District Court relied on California Business & Professions Code §5412 to determine that the artistic mural on the east wall (though not the west wall) constituted an "advertising display" as defined in the California OAA based on its belief that the website address for the City's Veteran's Memorial Fund was included on the bottom of the sign when it was initially erected. The District Court further relied on Lisa Heep's letter as indicating that the advertising sign had been permitted by the City, concluding that as a result of the City's "permission" it was "lawfully erected" within the meaning of the California OOA.

In its brief memorandum disposition, the Ninth Circuit corrected the District Court's mishandling of the central factual dispute in this case. The Court of Appeals specifically held that the City did *not* concede that a tall wall sign was ever lawfully erected on Petitioner's building. Petitioner's App. 4-5. Because West Hollywood did not permit tall walls in the zone where Petitioner's building is situated and thus the tall wall signs were not "lawfully erected," the Court of Appeals properly applied state law to conclude that Petitioner has no protectable property interests. This petition followed.

MISSTATEMENTS IN THE PETITION

1. Petitioner erroneously asserts that the City's regulation of tall wall signs is for "wholly aesthetic reasons." Petition at i, 9, 17, 18, 20, 22, 24.

The government interests sought to be advanced by the ordinance are aesthetics *and* safety. W.H.M.C. § 19.34.010. In the District Court, the City submitted substantial evidence to support its contention that traffic safety is enhanced by its regulation *and* the City argued that in California the regulation of billboards seeking the attention of motorists advances traffic safety as a matter of law. Indeed, a volume of the excerpts of the record on appeal is devoted to the City's evidence on the issue of traffic safety. Even so, as this Court has noted, the California Supreme Court held as a matter of law that an ordinance prohibiting billboards "designed to be viewed from streets and highways reasonably relates to traffic safety." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 508 (1981). In its decision, the District Court accepted the City's aesthetic interests as

sufficiently substantial for the purpose of meeting the *Central Hudson*[1] test and therefore denied Petitioner's motion for additional discovery on the "companion issue of traffic safety." Petitioner's App 44, fn 10.

2. Petitioner erroneously asserts that the City submitted no evidence with respect to the issue of aesthetics, relying instead on aesthetic values "personal to those on the city council that voted for it" Petition at 20; *see also* Petition at 4, 24 (contending aesthetic determinations purely "subjective").

Petitioner wrongly characterizes aesthetic consideration as a subjective determination of whether something is ugly. This formulation misses the point. Land use regulation of aesthetics is illustrated by the difference between being in Boston Commons and being in Time Square.

Regulating aesthetics is the task of coordinating development to create an ambiance; planners call it "a sense of place." The City relied on its General Plan, the co-called "constitution" of local land use planning in California,[2] to implement land use policies that allow for a dynamic, intensely urban environment on the Sunset Strip (where tall wall signs are welcome) and a more pedestrian oriented, low scale environment with street trees, awnings and antique shops on Beverly Boulevard

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1. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

2. *Lesher v. City of Walnut Creek*, 52 Cal.3d 531, 540-541 (1990).

where Petitioner owns its building. The City submitted substantial evidence with respect to the basis for its planning considerations. The Ninth Circuit recognized this:

> "The City submitted evidence that the sign code's restrictions on commercial tall walls sought to preserve and augment the differing characters of Sunset Boulevard and other areas of the city. Moreover, "[a]s to whether the City's [aesthetic] interests are served by the Sign Code, we generally defer to the legislative body passing the law." *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1073 (9th Cir. 2006). We disagree with Beverly that the sign code is internally inconsistent in encouraging tall wall commercial speech on Sunset Boulevard and generally prohibiting it elsewhere. The City's goal is to channel such speech to Sunset Boulevard, which is known for its flamboyant billboards, while simultaneously maintaining a more reserved aesthetic elsewhere."

Petitioner's App. 6

3. Petitioner erroneously suggests that the City banned tall wall signs altogether. *See* Petition at i, 17, 22, 24

Petitioner inconsistently describes the City's regulation as a "ban [of] an entire mode of communication" [Petition at 24] and as a prohibition on tall wall sign "from all parts of the City not having Sunset Boulevard addresses" [Petition at 22]. To clarify, West Hollywood does not ban tall wall signs. Instead, it permits tall wall signs in certain zones and prohibits them in others.

4. Petitioner erroneously asserts that the east wall contained advertising when it was first installed. Petition at 5

Whether the east wall initially contained advertising was a hotly contested fact that accounts for the difference between the District Court's opposite conclusions with respect to the two walls and the Ninth Circuit's decision treating both walls similarly. Indeed, this factual issue was the subject of the City's motion for reconsideration in the District Court. The Ninth Circuit correctly concluded that, whether or not the original mural contained advertising, the City believed that it did not.

> Both [City Planning Manager] Lisa Heep's letter and the City's briefs in the district court plainly made only a conditional concession: that *if* the murals contained no letters intended to advertise *then* they would be lawful. Heep's mistake regarding the premise (that the Veterans mural contained no letters

> intended to advertise) did not amount to a concession regarding the legal conclusion (that it was lawfully erected) relied upon by the district court.

App. 4-5

The Petitioner's Exhibit F, which depicts the east wall with a web site address and thus is "advertising," was *not* the mural that existed in September 2000. Petitioner's Exhibit F at App. 63 depicts the west wall on September 15, 2000. Exhibit F at App. 65 depicts the east wall on December 28, 2000, some three months later and *after* Lisa Heep's letter. The City submitted evidence to establish that the web site address was later added and did not appear on the mural in September 2000, when it first appeared. Ultimately, this factual dispute can be resolved, as the Court of Appeals did, by accepting that, at a minimum, Lisa Heep did not believe that the east wall contained advertising at the time that she issued her letter.

REASONS FOR DENYING THE PETITION

Petitioner offers the instant case as an opportunity to reconsider the *Central Hudson* test and delve back into the parameters for regulating billboards beyond where *Metromedia* fell short. Petition at 4-5. However, this case does not provide the vehicle Petitioner suggests.[3] The decision of the Court of Appeals set forth in its unpublished disposition memorandum is correct under the facts herein and the decision does not serve as precedent nor conflict with any decision of this Court or of any other court of appeals. Further review is unwarranted.

1. West Hollywood Limited The Placement Of Tall Wall Billboards To Certain Areas Of The City For Reasons Of Traffic Safety & Aesthetics; This Case Does Not Present An Opportunity To Review Whether Such A Regulation Could Be Justified By Aesthetic Considerations Alone

The central premise of the petition is wrong. The petition states that "[f]or wholly aesthetic reasons, Respondents forbade a specific type of outdoor advertising. . . ." Petition at i. As discussed above, the City did *not* rely wholly on aesthetic reasons and the City submitted extensive evidence with respect to both traffic safety and aesthetic justifications.

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3. It is noteworthy that the Ninth Circuit does not even cite *Metromedia*; this case primarily arose from Petitioner's contention that it had a property interest in the illegal signs arising from application of the state statute (California OAA).

It is true, however, that both the District Court and the Ninth Circuit found that aesthetic considerations were sufficient to justify the City's regulation of tall wall signs. The District Court relied on this Court's guidance in that regard:

> The Supreme Court has repeatedly held that a City's interest in aesthetics constitutes a substantial government interest. *See, e.g., City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984) ("it is well settled that the state may legitimately exercise its police powers to advance esthetic values.") and reaffirming the conclusion of the majority in *Metromedia*, the Supreme Court in *Taxpayers for Vincent* found that, the "City's aesthetic interests were sufficiently substantial to provide an acceptable justification for a content-neutral prohibition against the use of billboards." *Id.* Indeed, "the city's interest in attempting to preserve [or improve] the quality of urban life is one that must be accorded high respect." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976).

Petitioner's App. 43-44. Likewise, the Court of Appeals relied on *City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 807 (1984) to reach its conclusion that the City's aesthetic considerations alone were sufficient.

Nevertheless, while the City agrees with the courts, this case does not squarely present the question the petition purports to pose because (1) in this case the City did not rely wholly on aesthetic grounds and (2) the unpublished opinion has no precedential effect.

2. West Hollywood Has Not Banned Tall Wall Billboards, Merely Limited Them To The Sunset Strip Where, Like The Vegas Strip And New York's Time Square, Traffic Moves Slowly And They Contribute To An Intensely Urban Environment

The petition suggests that this case offers the opportunity to address the possibility that the *Central Hudson* test can be used to support "regulations designed to entirely prohibit commercial and non-commercial speech, like the West Hollywood ordinance here."[4] Petition at 19. However, the City's regulations do not entirely prohibit commercial and non-commercial speech. Not even close. The regulation at issue herein merely limits the zone in which enormous, multi-story signs may be erected. And it does not distinguish between commercial and noncommercial speech.

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4. The petition also repeatedly suggests that tall wall signs represent a new mode of communication and that it may just be time to re-think *Metromedia* and *Central Hudson* to account for this new mode of communication. *See, e.g.*, Petition at 4, 10, 11, fn 5. Petitioner reaches a bit to suggest tall walls are a new medium; as the pictures in Appendix F illustrate well, tall walls are really just an extra-large version of an old mode of communication. Text messaging would be an example of a new medium of communication, as would computer spam.

To succeed in its as-applied challenge to the City's regulations, Petitioner must show that the City's sign ordinance was applied to it in a manner that unconstitutionally impaired its first amendment rights. However, the City even-handedly enforced the sign regulations, which are justified without regard to any particular message or viewpoint. The regulations are tailored to serve the City's significant interests in regulating aesthetics and promoting traffic safety and, because there are a myriad of advertising options open, including over 12 approved sites for tall wall signs along the 1.2 mile stretch of Sunset Boulevard in the City of West Hollywood, the regulations leave open ample alternative channels of communication. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

Petitioner argues that the *Central Hudson* test applied in this case was a tautology; this conclusion is a result of giving – intentionally or not – short shrift to the City's real considerations: says Petitioner, "because it doesn't like the general look *(Central Hudson* step 2) then that becomes the justification for a ban (step 3) which is obviously the most effective way to 'solve' the 'problem' by simply eliminating all such signs and such a ban is said to go no further than necessary (step 4) because (tautologically) the ban is the only way to 'solve' the 'problem.'" Petition at 24.

Indeed, when fair consideration is afforded, which the Ninth Circuit managed to do even in its sparse disposition memorandum [Petitioner's App. 5], the application of *Central Hudson* test in this circumstance is unremarkable. The City wants to keep traffic flowing and minimize unreasonable distractions to drivers on its

streets and use its land use regulations to create distinct neighborhood ambiance (*Central Hudson* step 2) so it limits particularly distracting tall wall signs to areas where traffic generally moves slowly and channels these larger-than-life billboards to the Sunset Strip where they contribute toward the flamboyancy of the Strip while avoiding conflict with lower-key neighborhoods (*Central Hudson* step 3) thus balancing competing interests to avoid a complete ban without compromising the City's purposes (step 4). The Ninth Circuit further notes that Petitioner did not show any less restrictive means to accomplish the City's legitimate goals. Petitioner's App. 7.

To further complicate the facts of this case, Petitioner implies that it had acquired a grandfathered right to maintain its illegal tall wall signs as a function of unrelated changes in the West Hollywood zoning ordinance. Petition at 6. This theory has been rejected by both the District Court and the Court of Appeals. Petitioner illegally erected the tall wall signs in a zone where they were never permitted.

In any event, this case is not an example of any failure of the *Central Hudson* test to protect real first amendment rights. It is just a case of a property owner wanting to maintain its illegal but lucrative tall wall signs in a zone in which they are not permitted.

3. The Ninth Circuit Determined That Petitioner Waived Its Argument That The City's Ordinance Facially Discriminates Between Commercial And Noncommercial Billboards

To the extent that the Petition seeks to challenge the City's tall wall sign regulations on their face, the Court of Appeals determined that Petitioner failed to raise the argument that the ordinance facially discriminates between commercial and noncommercial tall walls and thus waived the argument. Petitioner's App. 5. In any event, the City's regulations do not distinguish between commercial and non-commercial speech.

4. The District Court And Ninth Circuit Decisions Are Both Based On Application Of State Law And Are Driven By The Determination Of Whether The Tall Wall Billboards Were "Lawfully Erected" Within The Meaning Of The California Outdoor Advertising Act

The central issue in this case is the fact that Petitioner did not have "lawfully erected" tall wall signs within the meaning of the California OAA. Because the tall wall signs were not lawfully erected, Petitioner had no property interest in them and was afforded no protection under the state statute. Petitioner's App. 3-5; Petitioner App. 28-40. Without a protectable property interest, the Petition does not present a ripe issue with respect to whether the City's sign regulations as-applied to Petitioner may be justified by aesthetics alone.

Petitioner presents without much analysis the question of whether the Court of Appeals may "ignore state definitions of property and invent its own definition contrary to state law in order to reverse a District Court liability finding" under the takings clause. Petition at i. First, the Court of Appeals did not create its own definition of "property." The Ninth Circuit flatly states that it is relying on the property interests as defined by California's Outdoor Advertising Act [Petitioner's App. 4], just as the District Court did [Petitioner's App. 30]. Second, as discussed above, the Court of Appeals did not reverse the District Court's finding based on the use of a different definition of "advertising." Both courts relied on the California OAA. The difference between the Court of Appeals' decision and the District Court's decision lies entirely within the interpretation of the City's admonition to the property owner [Lisa Heep's letter] that tall walls are not permitted in the zone in which Petitioner's building is located.

CONCLUSION

The two questions presented in the petition are not squarely raised by this case. While Petitioner rightly laments that *Metromedia* was a badly splintered decision, none of the weaknesses in first amendment jurisprudence that may arise from that fact is relevant to this case. This case does not involve a challenge to a regulation distinguishing between commercial and non-commercial speech, both because the City's regulation does not so distinguish and because Petitioner has waived that argument in its appeal. Whatever misgivings Petitioner documents regarding the current standards in first amendment jurisprudence as it affects the regulation of billboards, the instant case does not present an opportunity to address those concerns. The City documented with evidence in the trial court – whether or not it was legally required to – the basis for its legitimate interests in traffic safety and aesthetics in limiting tall wall signs to the Sunset Strip. More importantly, this case hinges on the fact that Petitioner had no protectable property interest in its two tall wall signs because they were not lawfully erected within the meaning of the California OAA.

For all the reasons set forth above, the City respectfully submits that the petition for a writ of certiorari should be denied.

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IN THE
Supreme Court of the United States

BEVERLY BOULEVARD, LLC,

Petitioner,

v.

CITY OF WEST HOLLYWOOD AND
WEST HOLLYWOOD COMMUNITY DEVELOPMENT
COMMISSION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

When the Court asked the Respondent City of West Hollywood to file a "response" to the Petition, it undoubtedly expected the City actually to respond to the issues and arguments raised in the Petition. That did not happen.

The City's "response" is largely a factual exegesis, rather than an effort to address the serious First and Fifth Amendment issues raised in the case. As shown hereafter, even the City's factual quibbles are belied by its own brief and its own ordinance.

Notwithstanding anything raised by the City, it remains true that the law regarding regulation of outdoor advertising is in serious need of the Court's review. The law has been plagued with confusion during the nearly three decades since *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) and *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Commn.*, 447 U.S. 557 (1980). The Ninth Circuit's holding amply demonstrates the confusion, conflicting with prior decisions of other Courts of Appeals as well as this Court. Specifically, the Ninth Circuit held that aesthetic rationalizations alone are sufficient to justify stultifying a property owner's exercise of First Amendment rights,

resulting in an uncompensated Fifth Amendment violation when the City's action takes private property to benefit the general public. This case is an appropriate vehicle to address the issues.

I.

AESTHETICS — ALONE — CANNOT JUSTIFY THE CITY'S FIRST AMENDMENT VIOLATION

The City's argument about aesthetics is wrong in multiple ways.

First, the City asserts that its ordinance was based on safety concerns as well as aesthetics. (E.g., Br. in Opp., pp. 5, 9.) Wrong. The City quotes the part of its own ordinance entitled "Purpose" as follows (Br. in Opp., pp. 3-4), demonstrating pure aesthetics and nothing more:

> "The provisions of this chapter are intended to:
>
> "A. Encourage creative and well-designed signs that contribute in a positive way to the city's visual environment, express local character, and help develop a distinctive image for the city.
>
> "B. Encourage signs that are responsive to the aesthetics and character of their particular location, adjacent buildings and

> uses, and the surrounding neighborhood. Signs should be compatible and integrated with the building's architectural design and with other signs on the property." (West Hollywood Mun. Code § 19.34.010.)[1]

When a legislative body expressly states the purpose of legislation, "we need not speculate as to [its] objectives . . . ." (*Zobel v. Williams*, 457 U.S. 55, 61, n. 7 [1982].) (See also *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534 [1973] [focus on "the stated purposes of the Act"]; *Edwards v. Aguillard*, 482 U.S. 578, 586 [1987] [same].) The West Hollywood city council can fare no better constitutionally than the United States Congress.

Indeed, in the specific context of examination of a suspected First Amendment violation under *Central Hudson*, judicial review is restricted to the statement of reasons expressed by the regulator. (*Edenfield v. Fane*, 507 U.S. 761 [1993] [discussed at Pet., p. 21, but ignored by the City].)

Second, the "evidence" (referred to generally by the City at Br. in Opp., p. 9 but never cited to the record) consisted simply of generalized papers, not

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[1] See also the District Court's opinion, quoting the City Council's findings when it refused to amend the ordinance in order to settle this litigation. (Pet. App. C-25.) The City, again, was wholly concerned with appearance, not safety. Indeed, the City's own brief shows its concern about the "quaint and hip" character of the neighborhood. (Br. in Opp., p. 4.)

on facts related either to the City in general or this neighborhood in particular. That sort of argument, too, is contrary to the Court's earlier decisions. In *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 (1993), the Court held that a mere assertion of generalized safety concerns (there, dealing with news racks) was not sufficient to validate a First Amendment incursion. Rather, specific proof of a safety problem dealing with the regulated property was required. As there was none there, so there is none here.

Finally, the City relies on a complete misunderstanding of *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984), quoting the Ninth Circuit's misinterpretation of that opinion. (See Br. in Opp., p. 15.) The Ninth Circuit went so far as to conclude that any argument that aesthetic interest alone could not justify a First Amendment violation was "foreclosed" by *Taxpayers for Vincent*. (Pet. App. A-6.) The manifold errors in that conclusion were discussed at Pet., pp. 18 and 23, but ignored by the City. In a nutshell, *Taxpayers for Vincent* involved safety factors that are absent here; regulated only signs placed on city-owned property (not private property, as at bench); and its holding was thus restricted to that context. *Taxpayers for Vincent* plainly did not authorize what either the City urged or the Ninth Circuit held. The Ninth Circuit's holding conflicts with the Sixth Circuit's holding in *Pagan v. Fruchey*, 492 F.3d 766, 776 (6th Cir. 2007; en banc) (discussed at Pet. pp. 22-23).

II.

METROMEDIA HAS CREATED CHAOS. THE CITY AGREES.

Nothing in the City's brief disputes the chaotic state of the law created by either *Metromedia* or *Central Hudson* and, particularly, by their interface. Indeed, the City concludes that "Petitioner rightly laments that *Metromedia* was a badly splintered decision" and that "weaknesses in first amendment jurisprudence . . . may arise from that fact . . . ." (Br. in Opp., p. 21.)

The City simply ignores those problems and rests on the assertion that Beverly's Petition should not be the vehicle by which the Court should address them. Such a conclusion might have more force if the City had actually analyzed any of the issues raised in the Petition. Instead, the City, for example, thinks it "noteworthy that the Ninth Circuit does not even cite *Metromedia* . . . ." (Br. in Opp., p. 14, n. 3.) That is correct, and that is part of the reason for this Court to act, not a reason to continue ignoring the problem.

As shown in the Petition, the holding in this case is representative of others reached by the Ninth Circuit (including *Ackerley Communications v. Krochalis*, 108 F.3d 1095 [9th Cir. 1997]) which the Circuit will not resolve by *en banc* proceedings. (See, e.g., Pet. App. D-59.) It has reached the point where that court believes it can decide these

complex issues in a brief memorandum. (See Pet. App. A-2 – A-7.) That leaves not only confusion, but conflict with other Circuits. (See Pet., pp. 12-15, 22-23.)

When coupled with *Central Hudson*, *Metromedia* can thus be applied to justify virtually any billboard regulation. Indeed, the City proves this vice clearly when it defends itself by saying that "the City even-handedly enforced the sign regulations" (Br. in Opp., p. 17), which means no more nor less than that it simply prevented anyone from access to "tall wall" communication except for those with Sunset Boulevard addresses. If the *Central Hudson* criteria can be twisted to such a degree that they justify such wholesale incursion on constitutional speech, then the Court's review is plainly needed.

None of that is analyzed in the City's response.

III.

THE NINTH CIRCUIT LACKS JURISDICTION TO IGNORE THE CALIFORNIA SUPREME COURT'S DEFINITION OF PROPERTY AND, BY SO DOING, OVERTURN FIFTH AMENDMENT PROTECTION

The City's brief ignores the Fifth Amendment arguments in the Petition, just as it ignored the First Amendment arguments.

The point is this: the District Court held that one of the Petitioner's signs was protected advertising property under California law and ordered compensation. That was in keeping with the California Supreme Court's broad interpretation of "advertising" under California statutory law. As that court put it (on remand from this Court in *Metromedia*), "'Advertising' is simply 'the action of calling something . . . to the attention off the public.' . . . Thus, in common usage a billboard bearing a political or even a personal message would be considered an 'advertising display sign.'" (*Metromedia, Inc. v. City of San Diego*, 32 Cal.3d 180, 188, 185 Cal.Rptr. 260 [1982].) As such, it is property and entitled to protection under Cal. Bus. & Prof. Code § 5412 (quoted by the City, Br. in Opp., p. 1). The Ninth Circuit, by *ipse dixit*, ignored California's *Metromedia* decision as well as this Court's earlier decision in the same case. (Pet. App. A-4.)

In response, the City quotes the California statute and the Ninth Circuit's conclusion *but not the California Supreme Court's application of the statute in Metromedia*, thus ignoring the expansiveness of that state law property definition, just as the Ninth Circuit had. (See Br. in Opp., pp. 8, 20.)

CONCLUSION

The issues raised in the Petition are important. The City has not shown the contrary. Petitioner asks that certiorari be granted so that the law governing this critical field can be clarified and so that Petitioner's First and Fifth Amendment rights can be vindicated.

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